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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.
No. 600.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, - - Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT.

In 1886 the Honorable Thomas M. Cooley was asked by the railroad companies running into what is called the southeastern territory to arbitrate between them a certain question of rates, or rather of the relative adjustment of rates, from crossing points on the Ohio and Mississippi rivers to certain points, such as Montgomery, Ala., and others within a territory in the southeast, which may be very roughly, but not with exact accuracy, described as lying between the Memphis & Charleston Railroad on the north, the Gulf of Mexico on the south, the Mobile & Ohio railroad on the west and the Chattahoochee River on the east. He was not asked to determine a question of specific rates, but of the relation of rates to each other. In other words, a question of the relative adjustment of rates. The ques-

tion had first been submitted to Mr. James R. Ogden, as the Commissioner of certain associated roads running into the territory described, and he had decided the question, after which it was submitted to Judge Cooley and he practically affirmed Mr. Ogden's ruling. The decision of Mr. Ogden and that of Judge Cooley are found in record on pages 185 and 186. So far as the particular controversy involved in this case is concerned, it is sufficient to say that Judge Cooley, affirming in this respect Mr. Ogden, decided that the rates from Jeffersonville, Louisville, New Albany, Evansville, Henderson, Cairo and Belmont, points on the Ohio River, to Birmingham, Montgomery, Selma and other points within a territory therein defined, and which is ordinarily spoken of as the southeastern territory, should be the same; that the rates from East Cairo, Columbus, Ky., and Hickman, Ky. (three points on the Mississippi River and all within Kentucky), to points in the territory described, should be *two cents less* than the rates from the Ohio River points just mentioned; and that the rates from Memphis, Huntington, Vicksburg and New Orleans (all points on the Mississippi River below Kentucky) should be *two cents less* than the rates from East Cairo, Columbus and Hickman, just mentioned. In other words, the rates from these lower Mississippi points should be *four cents* less than from the Ohio River points.

After this decision as to the relative adjustment of these rates to Montgomery and other points in the southeastern territory, the rates were adjusted in accord-

ance with it and remained the same until the building of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham, which made a very much shorter rail line than had previously existed between those two points. Upon the opening of this new line, the rates from Memphis to Birmingham on the first six classes of freight were greatly reduced below what they had been. After the introduction of this new factor, the rates from New Orleans to Birmingham on the six classes mentioned were at first reduced to correspond to the rates from Memphis to Birmingham in accordance with the principles of the Cooley adjustment. The reduction, however, was so great that it was soon found that such rates from New Orleans to Birmingham could not be maintained; and they were at first restored to the original figures and then reduced to figures which were intermediate between the original figures and those to which they had at first been reduced. (Rec. 275, 276.) The reduction of the rates on the six classes mentioned from New Orleans to Birmingham then made it necessary to reduce the rates on these classes from New Orleans to Montgomery, so as to be not higher than from New Orleans to Birmingham, as Montgomery is intermediate between New Orleans and Birmingham and it was considered not proper that the rates from New Orleans to Montgomery should be higher than from New Orleans to Birmingham. This adjustment, owing to the introduction of the Kansas City, Memphis & Birmingham Railroad, was finally reached in 1896. And the rates from New Orleans to Montgomery, as thus fixed,

remained unchanged for fourteen years, to-wit: from the time they were adjusted in 1896 until the action of the Interstate Commerce Commission, about to be mentioned.

Effective April 15, 1910, the Interstate Commerce Commission, acting on the complaint of the New Orleans Board of Trade, ordered a very material reduction in rates from New Orleans to Montgomery and Selma on six classes of freight. The railroad rates as they had existed for fourteen years and the rates fixed by the Commission and the amount of the reductions are shown by the following table:

NEW ORLEANS-MONTGOMERY-SELMA.

In Cents per Hundred Pounds.

Class	1	2	3	4	5	6	A	B	C	D	E	H	F
R. R. rates	89	79	68	55	47	36	24	27	20	16	40	35	32
Commission rates	89	77	55	42	35	35	24	27	20	16	39	35	32
Reductions	0	2	13	13	12	1	0	0	0	0	1	0	0

(Rec. 128.)

At the same time the Commission ordered a reduction in rates on the same classes of goods from New Orleans to Mobile. The railroad rates as they existed at the time of the Commission's action and the rates as fixed by the Commission and the reduction thus caused are shown by the following table, to-wit:

NEW ORLEANS-MOBILE.

In Cents per Hundred Pounds.

Class	1	2	3	4	5	6	A	B	C	D	E	H	F
R. R. rates	50	39	38	31	27	16	12	15	12	10	20	18	23
Commission rates	50	37	25	18	15	15	12	15	12	10	15	18	25
Reductions	0	2	13	13	12	1	0	0	0	0	5	0	0

(Rec. 122.)

And at the same time the Commission ordered a reduction of rates on certain classes of goods (though not exactly the same as in the other two cases) from New Orleans to Pensacola. The railroad rates as the Commission found them existing, and the rates fixed by the Commission, and the consequent reduction, are shown by the following table, to-wit:

NEW ORLEANS-PENSACOLA.

In Cents per Hundred Pounds.

Class	1	2	3	4	5	6	A	B	C	D	E	H	F
R. R. rates	55	45	38	31	27	16	18	18	15	13	25	25	30
Commission rates	55	45	35	25	20	15	18	18	15	13	25	25	30
Reduction	0	0	3	6	7	1	0	0	0	0	0	0	0

(Rec. 137.)

The facts which brought about this action may be briefly stated as follows: When the rates from New Orleans to Montgomery had been in existence, as explained above, more than eleven years, to-wit, from the fall of 1896 to the fall of 1907, attention was called to the fact that the rates from New Orleans to Mobile on certain classes of freight, plus rates from Mobile to Montgomery on these same classes were less than the through rates from New Orleans via Mobile to Montgomery; and that the same was true as to rates from New Orleans to Pensacola, plus the rates from Pensacola to Montgomery; that is to say, that the latter combination of rates was less than the through rates from New Orleans via Pensacola to Montgomery. Or, to express the matter in a phrase common in transportation circles, the combination on Mobile was less than the through rate from New Orleans to Montgomery, via Mo-

bile; and the combination on Pensacola was less than the through rate from New Orleans to Montgomery, via Pensacola. Accordingly, complaint was made of this fact to the Louisville & Nashville Railroad Company, although, as a matter of fact, practically no use had ever been made by shippers of this possible combination of rates to cut the Montgomery rates, and the company had had not the slightest difficulty in maintaining the Montgomery through rate. (Compton, Rec. 193.) The railroad company believed that the rates from New Orleans to Montgomery were just and reasonable. They had been in force for many years and had been fixed relatively to other rates between other points within the same territory, and were in accord with the adjustment prescribed by Judge Cooley many years before; and it accordingly refused to change these rates, believing, as it did, not only that they were intrinsically just and reasonable, but that they were relatively fair, and that to change them would require a change in the rates to Montgomery from all Ohio and Mississippi river crossings, and that these changes would in turn require other changes to be made from these same crossings to other points in the South. In other words, that the whole system of rate adjustment would be broken down and that a re-adjustment would have to be made, which would produce endless confusion and trouble and disarrangement of business for a long period of time.

The railroad company did, however, raise the rates from New Orleans to Mobile, so that the combination of rates from New Orleans to Mobile, plus the rates from

Mobile to Montgomery, would not be less than the through rate from New Orleans to Montgomery, via Mobile. It made this raise in rates from New Orleans to Mobile, because the rates as then existing were such as had been originally established when the road from New Orleans to Mobile was first built, and at a time when there was active water transportation from New Orleans to Mobile by way of the Gulf of Mexico, there being when this road was first built very sharp competition between the railroad line and the boat line, resulting, of course, in fixing very low rail rates. But by the time this controversy arose in 1907 this water traffic had practically ceased, so that there was really no competition with the railroad. The rates which had been fixed in the old days of bitter competition were lower than was reasonable; and accordingly the railroad company raised these rates to a point where the New Orleans-Mobile rate could not be used to cut the New Orleans-Montgomery rate, which had been in existence for many years.

Exactly the same conditions existed with reference to the Pensacola trade. When the railroad line was first opened to Pensacola there was active water transportation from New Orleans to Pensacola, and the original rail rates were fixed in competition with these water rates. But this competition had practically died out by the time this controversy arose, and, accordingly, the railroad company raised the rates from New Orleans to Pensacola so that that rate could not be used to cut the

through rate from New Orleans to Montgomery, via Pensacola.

When this action was taken on the part of the railroad company the New Orleans Board of Trade filed three complaints against the Louisville & Nashville Railroad Company before the Interstate Commerce Commission, one complaining of the rate from New Orleans to Mobile, known on the docket of the Commission as No. 1310; another complaining of the rates from New Orleans to Pensacola, known on the docket of the Commission as No. 1328, and another complaining of the rates from New Orleans to Montgomery, known on the docket of the Commission as No. 1313.

Answers were filed to these several complaints by the Louisville & Nashville Railroad Company. A hearing was had at which testimony was heard before two of the Commissioners at New Orleans, after which the Commission delivered a written "report" upon which it based an order sustaining the complaint in each of the cases, requiring the New Orleans-Mobile rates and the New Orleans-Pensacola rates to be restored to what they had been when they were fixed in competition with the water rates (*some of them being fixed actually below the water rates as existing at the time of the hearing*); and requiring the New Orleans-Montgomery rates on traffic moving through Mobile to be reduced to the rates reached by adding the New Orleans-Mobile rates to the Mobile-Montgomery rates, and requiring the New Orleans-Montgomery rates on traffic moving through Pensacola to be reduced to the Pensacola combination.

After this action by the Commission the Louisville & Nashville Railroad Company filed the complaint in the present case, seeking an injunction against the Commission to prevent the enforcement of the rates fixed by the Commission, the ground of the complaint being that the rates, as they had been fixed by the railroad company, and as they had existed at the time the Commission acted, were just and reasonable rates, and that the rates fixed by the Commission were unusually, unnecessarily, unjustifiably and unreasonably low; and that the action of the Commission in so reducing them was unreasonable, unlawful, arbitrary and oppressive. As to the Mobile-Montgomery rates (which are by far the most important, because this traffic is much greater than that between New Orleans and Mobile, or New Orleans and Pensacola) the bill charged that these rates were lowered *solely on account of the fact* that the rates from New Orleans to Mobile, *as they had existed prior to August 13, 1907*, when added to the rates from Mobile to Montgomery resulted in figures lower than the rates from New Orleans to Montgomery (Rec. 25). Furthermore the bill charged that it would produce unjust discrimination in favor of the city of New Orleans, unless the rates between many other southern points were similarly reduced to rates that were unreasonably low, to the very great, unjust and unnecessary damage of the complainant, all of which was contrary to the Act to Regulate Commerce, was unlawful, arbitrary, oppressive and in excess of the authority granted to the Commission, and will deprive complainant of its property

without due process of law, in violation of the Constitution of the United States.

A motion was made for a preliminary injunction in accordance with the prayer of the bill. The Commission objected to the motion and filed an answer to the merits. Certain affidavits were filed by the complainant, none being filed by the Commission. A hearing was had upon the motion before Judges Severns, Knappen, and Warrington of the Sixth Circuit. They overruled the motion, an opinion being delivered by Judge Severens. Thereupon the parties entered upon the taking of proof and a large amount of testimony was taken before an examiner appointed by the court, who has filed his report showing the testimony taken, together with a number of exhibits filed during the course of the hearing.

In addition to the parol testimony thus introduced, the complainant has put into the record a complete copy of the record of the cases before the Interstate Commerce Commission, including the pleadings in the three several cases, a transcript of all the parol testimony heard by the Commission and the documentary evidence introduced, it being agreed of record in the present case that the copies thus introduced "are copies of *all the evidence* introduced by the complainant and defendant at the said hearing before the Interstate Commerce Commission." (Rec., 334, 335.)

We, therefore, have now before the court the complete record of the proceedings before the Interstate Commerce Commission which resulted in the Commis-

sion's action in reducing the rates as herein complained of. We have the pleadings of the parties before the Commission in those cases, all the evidence that was heard by the Commission, the report of the Commission and its final order. Pleadings, report and order of the Commission are filed as exhibits with the bill in the present case, being Exhibits A, B, C, D, E, F and G.

By the Act of Congress creating the Commerce Court the case was transferred to that court from the circuit court; and was there decided; an able and exhaustive opinion being delivered by Judge Archbald—Judge Mack dissenting.

Upon final hearing the Commerce Court entered the following decree:

> "This cause came up to be heard upon the appeal, answer and proofs, and having been argued by counsel, was submitted for final decree; and upon consideration thereof it is ordered, adjudged and decreed by the court as follows, towit:
>
> " 'The order of the Interstate Commerce Commission, made on November 26, 1909, in the three cases of the New Orleans Board of Trade, Ltd., v. the Louisville & Nashville Railroad Co., numbered respectively, 1310, 1913 and 1328, which order, by its original terms, was to go into effect February 1, 1910, but the effective date of which was postponed by supplemental orders until April 15, 1910, and which order is hereinafter set forth, *was and is not sustained by any substantial evidence*, and is invalid and is hereby annulled, and the Interstate Commerce Commission, its members, their agents, servants and representatives are hereby perpetually enjoined from enforcing any order or from taking any steps or instituting any proceedings for the enforcement of the same; said order hereby annulled

and the enforcement of which is enjoined was and is in words and figures as follows:' " (here follows a copy of the order annulled. (Rec. 631.)

ARGUMENT.

After the argument, but before the decision of this cause in the Commerce court, this court decided the case of Int. Com. Com. v. Union Pac. Railroad, 222 U. S. 541, which was a rate case, wherein the Commission's order in reducing rates was attacked, and in which this court, in an opinion by Mr. Justice Lamar, said:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) *if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it;* or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Int. Com. Com. v. Ill. Cent., 215 U. S. 452, 470; Sou. Pac. v. Int. Com. Com., 219 U. S. 433; Int. Com. Com. v. Nor. Pac., 216 U. S. 538, 544; Int. Com. Com. v. Ala. Midland R'y Co., 168 U. S. 144, 174.

"In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether on like testimony it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Ill. Cent. v. Int. Com. Com., 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." (P. 547, our italics.)

The Commerce Court decided the case at bar in the light of the principles laid down in the case just cited, as is shown by the opinion of the court which cites this Union Pacific case, and as is also shown by the terms of the decree itself, which finds that the Commission's order in controversy "was and is not sustained by any substantial evidence." (Rec. 631.)

Counsel for the United States in their printed brief in this court concede that in order to sustain their view of the law in the case at bar, it is necessary to overrule the Union Pacific case. Referring to the portion of the opinion in that case above quoted, they say:

"It must be conceded that under the 5th exception above specified a review of the evidence is permissible to determine 'if the Commission acted so

arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it,' but the United States respectfully insists that the statutes and previous decisions of this court do not justify that exception, and asks that the opinion be to that extent modified. (Brief for the U. S., p. 18.)"

It is not conceivable that this court could have failed to recognize the very great importance of the language used by it in deciding the case referred to, or that it could have failed to give to the matter the mature consideration which its importance called for. We do not, therefore consider it necessary to follow the argument of counsel wherein they attempt to show that the court improperly stated the law in the respect upon which comment has been made, nor to respond in detail to the argument. A brief response however may be permissible.

Counsel say that the language to which they object is made to rest primarily upon the supposition that the statute makes the findings of the Commission *prima facie* correct. We do not understand that the court makes its conclusion rest primarily upon this supposition. On the contrary, we understand the court to refer to this provision of the statute merely in support of the proposition that ordinarily the court will accept the Commission's finding of a fact as true, unless strong ground be shown for not doing so. While it is true that the declaration in the original statute that the Commission's findings shall be *prima facie* correct, is omitted from the statute as amended by what is called the Hepburn Act of June 29, 1906, yet there is certainly

nothing in this amendment which says that the findings of the Commission shall be *conclusively correct.*

Before the passage of the Hepburn Act it had been authoritatively settled by this court that after a hearing before, and an order by, the Interstate Commerce Commission and when suit had been brought, either to enforce or enjoin this order, it was permissible in such suit "to take evidence upon the merits of the original controversy." This was expressly determined by this court in Int. Com. Com. v. Alabama Midland Railway, 168 U. S. 174, wherein the point was expressly made by the Commission that in the circuit court "there is no general jurisdiction to take evidence upon the merits of the original controversy." In denying this proposition, the court, in addition to referring to previous authorities on the same point, said:

> "We think this contention is sufficiently answered by simply referring to those portions of the Act which provide that, when the court is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises." (Page 174.)

Surely if Congress in passing the Hepburn Act had intended to make so radical a change in the law as to take away the then thoroughly established right to take evidence in the circuit court, it would have said so in plain terms and not left the matter to mere inference. So far from taking away this right, it uses language which would seem even more surely to recognize the

right than did that of the preceding act. In lieu of the language of the original act referred to in the above quotations, the Hepburn Act provided that "the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful *in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition.*" This certainly recognized as clearly as the language of the original act that issues of fact would be made in the circuit court and that that court should prosecute such inquiries and make such investigations as it saw proper to enable it to determine them. And it surely did not use this language intending that the only issues of fact that could be made or which the court could try should be (1) as to whether or not process was served and (2) as to whether or not a hearing had been had before the order was made—matters that could be ascertained by a clerk in any lawyer's office. It is impossible to believe that Congress by such language as it has here used could have intended to make so radical a change in the pre-existing law as would be accomplished by taking away the right which had been thoroughly established in Int. Com. Com. v. Alabama Midland Railway, *supra*, of introducing in the circuit court evidence upon the merits of the original controversy.

Furthermore in Int. Com. Com. v. Chicago and Rock Island Co., 218 U. S. 88, a rate case which arose after the passage of the Hepburn Act, evidence was taken in the circuit court upon the merits of the controversy as to the reasonableness of the rates, and instead of this

court saying that this evidence was all incompetent, the court after showing that the findings of the Commission were fortified by presumption of truth due to the judgments of tribunals appointed by law and informed by experience, simply said: "The testimony in this case does not shake the strength of such presumptions." (Page 110.) Thus indicating clearly that the evidence was considered, but was not sufficient. And the Alabama Midland case, and especially that portion of the opinion determining the right to take evidence in the circuit court, is expressly cited with approval in the late case of Int. Com. Com. v. Union Pacific, 222 U. S. cited above.

The case at bar arose and is based upon the facts which occurred after the passage of the Hepburn Act of June 29, 1906, and was fully prepared, and ready for submission, before the passage of the act of June 18, 1910, and is governed, therefore, by the provisions of the 1906 amendment; though the amendment of 1910 makes no change in the matters now under consideration. In creating the Commerce Court it expressly provides that the Commerce Court "shall have the jurisdiction now possessed by Circuit Courts of the United States and the judges thereof over all cases of the following kinds" (enumerating among others, cases for the enforcement or annulment of orders of the Interstate Commerce Commission); so that the juridiction of the Commerce Court in cases of the designated kinds, is exactly the same as was the jurisdiction of the circuit court at the time the amendment of June 18, 1910,

was passed. And this court so held in Procter & Gamble Co. v. U. S., 225 U. S. 282.

In the case at bar we have always contended and expect herein to show, and think that the opinion of the Commerce Court clearly shows, that there was no substantial evidence before the Commission upon which to base its order finding that the rates in question were unreasonable. But we also believe, in accordance with the authoritative decisions of this court, and in view of the language of the act, that it is competent to introduce additional evidence in a suit brought to enforce or enjoin an order of the Commission; and we acted upon that principle in our preparation of the present case, the record in which shows how important it is that such right should exist. The Commission may, as it did in this case, state facts susceptible of contradiction by documentary evidence, such as tariffs, which no one can dispute, or may state facts easily susceptible of explanation. The importance and entire propriety of recognizing this right of introducing testimony in a case brought to enforce or enjoin a Commission order will appear when the record in the present case is considered.

Moreover we submit that if the amended act had expressly declared that the finding of the Interstate Commerce Commission, to the effect that a given rate was excessive, should be conclusive and that no evidence should be introduced to the contrary in a case growing out of such order, the act would in that respect have been unconstitutional. This exact point was determined by this court in Chicago, Milwaukee, etc., R'y v. Minne-

sota, 134 U. S. 418, 456, 457, 458; the principle of which case was expressly reapproved in *ex parte* Young, 209 U. S. 123, 147.

When we remember that over ten thousand millions of dollars are invested in railroad properties in this country (Chicago, Milwaukee, etc., v. Tompkins, 176 U. S. 167, 172), it is incredible that Congress should have intended, or that it should have the power, to vest in a mere administrative body like the Interstate Commerce Commission (I. C. C. v. Humboldt Steamship Co., 224 U. S. 474, 484), the absolute and arbitrary power to strike down the values of these great properties by declaring the rates fixed by the companies to be unreasonable, and by ordering a reduction of them, thus decreasing the income from them, *without any substantial evidence upon which to base the order*—we say it is incredible that it should have been intended, or that the power should exist, to vest such a power in any such tribunal in a government of which this court has said: "when we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." (Yick Wo. v. Hopkins, 118 U. S. 356, 369.)

Without further comment we shall assume the law to be that if the order of the Interstate Commerce Commission herein complained of was not based upon any substantial evidence, then the Commerce Court was

right in annulling it and that the decree appealed from should be affirmed.

Before considering the details of the evidence, we call the court's attention briefly to the status of the parties before the Commission. The rates complained of by the New Orleans Board of Trade *were in existence and in operation at the time the complaints were filed.* The rates from New Orleans to Montgomery, being the rates which cover very much the larger part of the traffic involved in the complaints of the New Orleans Board of Trade (because the traffic from New Orleans to Montgomery is very much heavier than the traffic from New Orleans to Mobile or from New Orleans to Pensacola) had been in effect for fourteen years before these complaints were filed. And while the rates from New Orleans to Mobile and from New Orleans to Pensacola had not been in effect a great length of time and had been raised from somewhat lower rates which had previously prevailed, yet even as to these there was no presumption of wrong in raising them, no presumption that they were unreasonable simply because they had lately been raised. This proposition was settled by this court in I. C. C. v. Chicago Great Western R'y, 209 U. S. 108, in which this court said:

> "It must be remembered that there is no presumption of wrong arising from change of rates by a carrier. A presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the

change must, when properly called upon, be able to give a good reason therefore, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done." (Page 119.)

And in these cases before the Commission the carrier did explain that the lower rates originally fixed between New Orleans and Mobile and New Orleans and Pensacola had been fixed in competition with water transportation, but that this water transportation had ceased to exist when the rates were raised.

Therefore, both as to the principal rates in controversy, to-wit, the New Orleans-Montgomery rates, and also as to the New Orleans-Mobile rates and the New Orleans-Pensacola rates the burden was upon the parties complaining of those rates *to show that they were unreasonable,* and to show this by *some substantial evidence* that would satisfy a reasonable mind. The burden was not upon the carrier to prove that its rates were reasonable. It is true that the amendment of June 18, 1910, to Section 15 of the Interstate Commerce Act provides that, "at any hearing involving a rate increased *after January 1, 1910,* or of a rate *sought to be increased after the passage of this act,* the burden of proof to show the increased rate or proposed increased rate is just and reasonable shall be *upon the common carrier.*" But none of the rates involved in this case were increased or sought to be increased after January 1, 1910. As said before, the New Orleans-Montgomery rates complained of had been in effect for fourteen years when the complaint was filed, and the New Orleans-Mo-

bile rates and the New Orleans-Pensacola rates complained of had been fixed in August, 1907. And the statute mentioned is itself an implied recognition of the proposition that as to rates in existence prior to January 1, 1910, the burden of proof to show them unreasonable, in case of an attack upon them, is upon the complaining party.

Another thing to be considered is that even under the latest amendment to the Interstate Commerce Act, to-wit: amendment of June 18, 1910 (though the facts involved in the case at bar all arose prior to that act, and this suit was instituted and fully prepared ready for submission in chief prior to the passage of that act) does not give the Interstate Commerce Commission any power of initiation in the fixing of rates, where there are existing rates already in effect. The power of the Commission to fix rates under the late amendment of June 18, 1910, is practically the same as it was under the Hepburn amendment of June 29, 1906, which controls the present case, and which fixes the power of the Commission in this regard in the following language, to-wit:

> "That the Commission is authorized and empowered, and it shall be its duty, whenever, after *full hearing upon a complaint made* as provided in Section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier or carriers * * * are unjust or unreasonable, or unjustly discriminatory, or unjustly preferential or prejudicial, or otherwise in violation of any of the provi-

sions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged," etc.

We thus see that the Commission has absolutely no power of originating rates. That power is still left with the railroads. They still have the primary right to fix rates for services at what they think are just and reasonable. As said by this court in I. C. C. v. Chicago Great Western R'y Co., 209 U. S. 108, "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between skippers and communities, yet in no proper sense is the public a general manager" (p. 118), and it is only when rates are fixed by the railroad companies, which are "unjust or unreasonable or unjustly discriminatory of unjustly preferential or prejudicial" that the Interstate Commerce Commission is given any right or power to fix rates. In other words, when the Interstate Commerce Commission has found, upon complaint, and after full hearing that the existing rates are unjust or unreasonable it is not required to stop with a mere declaration to that effect (as was the law prior to the Act of June 29, 1906), but can then proceed further and prescribe what rates shall be considered just and reasonable for the future, for a period not exceeding two years.

It must always be remembered, however, that the

first thing to be considered in this process is the existing rate fixed by the railroad company; because if that is a reasonable rate, the Commission has no power to fix another rate. All practical men recognize that there may be quite a wide range within the boundaries of which any rate fixed would be considered reasonable, it being a matter of policy as to the exact point at which it shall be fixed. It may be possible to fix a point beyond which the rate would be *unreasonable* because *too high,* and to fix another point below which the rate would be *unreasonable* because *too low.* It may be that anywhere between these two points a rate would be considered reasonable. The statute gives the Commission no power or discretion in the matter, unless the rate fixed by the railroad company can be said to be *unreasonable.* Then, and not until then, does the right or power of the Commission to fix a rate arise.

An exactly similar question to this was determined by this court in I. C. C. v. Nor. Pac. R'y, 216 U. S. 538, involving the question of the right of the Commission to establish a *through route* and fix *joint rates.* The same section of the act, to-wit: Section 15, which gives the Commission the power to consider existing rates, and if they are found to be unjust or unreasonable, then to prescribe what will be just and reasonable, also provides that: "The Commission may also, after hearing on a complaint, establish through routes and joint rates * * * provided *no reasonable or satisfactory through route exists.*" Complaint was made before the Commission that there was no satisfactory through route

from the East to certain points between Portland and Seattle. The Commission heard the complaint, concluded that it was well founded, and ordered the establishment of a through route by means of the Union Pacific and the Northern Pacific. The Northern Pacific insisted that there was an existing through route, which was in fact reasonable and satisfactory, and that the Commission, therefore, had no power to establish the through route which it had undertaken to establish. On the other hand, the Commission insisted that it had concluded that the existing through route, referred to by the Northern Pacific, was not satisfactory or reasonable; and insisted further that the determination of this question of fact rested with the Commission, and that the court was without authority to disregard it simply because the court might consider the order as inexpedient or the conclusion of the Commission as erroneous. This court, however, held otherwise, saying:

> "We are of opinion then that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go into that inquiry we need not now decide. No doubt in complex and delicate cases great weight at least will be attached to the judgment of the Commission." (P. 544.)

And this case, the I. C. C. v. Nor. Pac., and especially the opinion therein at page 544, is one of the cases referred to as authority in the case of I. C. C. v. Union

Pac., 222 U. S. 541, 547, by which the Commerce Court was guided in deciding the case at bar.

Opposing counsel in the case at bar comment and lay great stress upon the fact that the language of Section 15 giving the power to make through routes and joint rates makes that power dependent on the *fact* that no reasonable or satisfactory through route exists, and that this was the language considered in I. C. C. v. Northern Pacific, 216 U. S., *supra;* whereas they say that the language of that portion of the section which gives the Commission the power to fix single rates gives the Commission this power when it shall be *of the opinion* that the existing rates are unreasonable. And they argue that all that is necessary to give the Commission the power to fix new rates is simply that it shall express *the opinion* that the existing rates are unreasonable, and that if it does this the court has no power whatever to go behind it. We submit that this is an utterly unreasonable construction of the section, and gives a wholly undue significance to a slight difference of language; and we believe that the fact that this court in the Union Pacific case referred to this Northern Pacific case, and to the very portion of the opinion upon which we have commented as authority for the conclusion reached in the Union Pacific case, confirms our review of the proper construction of the section as to the power of the Commission in making single rates. Every statute must be given a reasonable construction; and it is inconceivable why, in the very same section, in giving, at one place the power to make single rates and at another place the

power to make through rates, Congress should have intended in the first case to make the power dependent merely upon the Commission's arbitrarily expressed *opinion* that reason existed for making new rates, while in the other case it intended that the Commission's power to make through rates should depend upon the *fact* of a necessity existing therefor. In each case, of course, the Commission, whether proceeding to make single rates on the one hand or through rates on the other hand, must first have had a hearing and reached a conclusion, as to the existence of the conditions requiring a change and, as said above, it is impossible to think of any reason why Congress should have intended this mere conclusion or opinion of the Commission to be absolutely conclusive in one case and not in the other. Different parts of an act are sometimes written by different persons, or written by the same person at different times; and even when written by the same person at the same time, precisely the same language is not always employed to express the same idea; but the court when it comes to interpret an act which has been passed must give a reasonable construction to the whole, and can not accept merely slight variations in language, covering similar situations which would reasonably be treated in the same way, as indicating an attempt to treat them differently.

In conclusion of the matter, therefore, we insist that before the Commission had any power to fix new rates from New Orleans to Montgomery, or New Orleans to Mobile or New Orleans to Pensacola, on complaint of the New Orleans Board of Trade, the burden of proof

was upon the complaining party, to-wit: the New Orleans Board of Trade, to show, not by a mere scintilla of proof, but by "substantial evidence" that the existing rates, which the railroad company had fixed and which it had the primary right to fix, and which were presumptively reasonable, were in fact unreasonably high.

With these principles in mind let us turn to—

THE EVIDENCE.

We insist that there was absolutely *no evidence* before the Commission that the railroad rates which it found in existence were unjust or unreasonable. We do not mean simply that the weight of the evidence was to the effect that they were reasonable, but we insist that there was *no evidence* that they were *unreasonable.* We submit that, if this case had been a jury case, the court would have been justified in instructing the jury *peremptorily* that there was no evidence that the rates were unjust or unreasonable. It is true some *complaint* was made when the New Orleans-Mobile rates were raised. But mere complaint does not show that rates are unreasonable. It is also true that merchants testified that they could not make as much money under the high rates as under the lower rates, that they "felt" the raise. But that does not show that they were unreasonable. The same thing would be true if *wages* or the *cost of material* should be raised. That would not show that the raise was unjust or unreasonable. It is

absolutely plain that, while the Commission makes a finding, in the language of the statute, that the rates were unjust and unreasonable, yet it was influenced solely by the fact that the New Orleans-Mobile rates, after existing for many years, had been raised; though the Commission in its own report shows that those rates had been fixed to meet active water competition, and that this competition had ceased when the rates was made. One fact which clearly shows that the Commission did not really find that the rates were unreasonable, but that it simply determined to restore the former rates, is that in case of the sixth class in the New Orleans-Mobile rates and also in the New Orleans-Montgomery rates it made a reduction of *only one cent*. There is absolutely nothing, not a scintilla of evidence, that could enable the mind of any reasoning being to determine that *16 cents* was an *unreasonable* rate on sixth class freight from New Orleans to Mobile, but that *15 cents* was a *reasonable* rate; or that *36 cents* was an *unreasonable rate* on the same class of freight from New Orleans to Montgomery, but that *35 cents* was reasonable. The Commission saw that 15 cents had been the rate for several years on this class of freight from New Orleans to Mobile, and that it had been raised to 16 cents; and the Commission, without any evidence whatever that a difference of one cent changed a reasonable into an unreasonable rate, simply ordered the former rate restored. And as this made the combination of the New Orleans-Mobile rate and the Mobile-Montgomery rate one cent less than the through New

Orleans-Montgomery rate, it ordered that rate reduced one cent.

We cite this as a mere incident in support of our assertion that the Commission did not find, and had absolutely no evidence before it to justify a finding, that the existing rates were, in and of themselves, unjust or unreasonable, but that it simply determined to restore all the former rates that had been raised, with no real regard for the justice and reasonableness of the separate rates then existing, and that, too, although this court had expressly held that "the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done." (I. C. C. v. Chicago, etc., R'y Co., 209 U. S. 108, 120.)

Before commenting upon the evidence which was introduced we may properly refer to certain kinds of evidence which were *not introduced.*

In the first place, although it is now insisted that the railroad company can not successfully attack the Commission-made rates except by showing the *cost of service* and by comparing the cost of service with the rates, for the purpose of showing that a reasonable profit above the cost of service is not permitted, yet it is a significant fact that when the burden of proof was upon the other party, and an effort was being made to show that the existing railroad-made rates were unreasonable, there was not the slightest pretense of showing the cost of service, or of comparing the cost of service with the revenue arising from the rates complained of. In other words, when the shipper (as we may treat

the Board of Trade) was complaining that a rate was unreasonable and that matter was up for determination on his complaint, no one seemed to think that it was incumbent upon him to prove the cost of service and to show that the rate complained of was unreasonable by comparing the revenue it would produce with the cost of service; though the position is now taken that when the railroad company complains of a Commission-made rate as unreasonable, the only way in which it can make out its case is to prove the cost of service and compare this with the revenue produced by the rate.

Again there was no proof at all before the Commission as to the value of the road over which the traffic moved.

Again no testimony of any experts in rate-making was introduced to show that the existing rates were unreasonable.

Again, there was no proof that the rates complained of were higher than rates between other places where the circumstances and conditions were substantially similar, so as to afford a fair comparison.

And when the court comes to analyse the evidence as the Commerce court did analyse it, saying, as it does in its opinion that it had "read and reread the evidence," which is manifest from the face of the opinion, it will find, as that court found, that there was absolutely *no substantial evidence* to justify the finding of the Commission that the rates in existence, which the carrier had made, were unreasonably high.

Section 14 of the Commerce Act requires the Com-

mission to file a written report showing the grounds upon which it has made an order, and for the manifest purpose of enabling the parties and the court to understand these grounds and to *inquire into them.* The Commission in the present case filed such a report; and we submit that practically every conclusion which it states as a reason for its finding that the existing rates were unjust or unreasonable, is either absolutely *contradicted by uncontradicted evidence*—frequently documentary in character, such as rate sheets—or is a wholly irrelevant consideration which, as a matter of law, furnishes no legal ground for the conclusion asserted.

REPORT OF THE COMMISSION.

As heretofore explained, there were really three cases before the Commission, to-wit: (1) a case involving the rates on certain classes of goods from New Orleans to Montgomery; (2) a case involving rates on this same class of goods from New Orleans to Mobile and (3) a case involving the rates on somewhat different classes of goods from New Orleans to Pensacola. The New Orleans-Montgomery case was known on the docket of the Commission as No. 1313; the New Orleans-Mobile case as No. 1310 and the New Orleans-Pensacola case as No. 1328. The three cases were heard together and each witness was allowed to tell all he knew about each of the three cases. This was done for the convenience, mainly, of the witnesses, but it is not by any means conductive to clearness in understanding the facts rele-

vant to the three caess. It has tended to confuse. The Commission made up one report for the three cases. We consider it, however, absolutely essential to consider these cases separately; they do really involve different considerations, and they can not justly or intelligently be fused into one.

We will first take up the New Orleans-Montgomery case, because, as said before, this is much the more important case, involving a very much larger amount of traffic than the other two cases.

As to each case separately we will first show the entire absence of evidence before the Commission showing the rates complained of to be unreasonable, and then we will refer to the evidence introduced by the railroad company, both before the Commission and before the court, explaining the situation and showing the entire reasonableness of the rates made by the carrier.

We recognize that the examination of the evidence necessary to be examined in this case is tedious and uninteresting; but as truly said by this court in I. C. C. v. Stickney, 215 U. S. 98, 110, "the convenience of Commission or court is not the measure of justice."

NEW ORLEANS-MONTGOMERY CASE.

A.

The report of the Commission does not call attention to the fact, but it is an undisputed fact that the New Orleans-Montgomery rates on Classes 2, 3, 4, 5, 6 and E, which the Commission lowered, had been in ef-

fect, without change, for fourteen years at the time of the Commission's action, to-wit: since October 15, 1896 (except that on Classes 5, 6 and E there had been on January 1, 1908, some reductions, which were still in effect when the Commission acted), the Commission's rates becoming effective April 15, 1910. (Compton's testimony, Rec. 180.) But, speaking of these rates, the Commission, in its report, says:

> "With respect to the through rates from New Orleans to Montgomery, Selma and Prattsville and to the southeastern territory, it was shown that the merchants of New Orleans have heretofore made ineffectual efforts to secure better rates to this territory, *as higher rates were in effect from New Orleans to this territory than existed from distributing centers at greater distances west and north of said territory,* the situation being such that New Orleans was cut off from the trade of this section as to many products and greatly restricted and burdened as to many others on account of the high rates of transportation." (Rec. 75.)

Now this statement that higher rates were in effect from New Orleans to the southeastern territory than existed from distributing centers at greater distances west and north of the territory is not only absolutely unsupported by any testimony given in the record, *but the contrary is expressly shown by testimony that is undisputed.*

We have filed in this case, as part of this record, all the evidence that was heard by the Commission (Rec. 341, etc.), and this court will look in vain through this evidence for anything to support the statement here

made in the Commission's report. And, on the other hand, the testimony of Mr. Compton, traffic manager of the complainant, and which testimony is absolutely uncontradicted, shows that exactly the contrary of the statement here made by the Commission is true. Speaking on this subject, Mr. Compton says:

> "The rates from New Orleans to Montgomery and Selma as they existed just prior to the date the Commission's order was made effective were not higher than existed from distributing centers at greater dictances west and north thereof. Not one of the Ohio and Mississippi rive crossings and no points reaching Montgomery and Selma through those crossings had an advantage over New Orleans. On the contrary, New Orleans had an advantage over all the Mississippi River gateways from Hickman, Ky., north, and an advantage over Memphis on the higher classes, and equality with Memphis on all other classes, and also an equality with Huntington, Vicksburg and the Mississippi River Valley to Memphis. In proof of this I submit the following comparisons of rates in effect just prior to April 15, 1910, and those in effect on that date, to Montgomery and Selma, from Cincinnati, Ohio, Louisville, Ky., Evansville, Ind., Cairo, Ill., St. Louis, Mo., Memphis, Tenn., Vicksburg, Miss., and New Orleans, La., together with the distances."

Then follows the tables of rates mentioned, and the correctness of which no one has ever questioned. (Rec. 195, 196.)

The statement of the Commission on this point to the effect that the rates from New Orleans into this territory were higher than from the distributing points at greater distances west and north seems a severe ar-

raignment. But it is simply incorrect in fact and has no evidence whatever to support it. When the Commission says that by reason of this fact New Orleans was "cut off" from the trade of that section is it simply a statement based on an incorrect premise.

B.

Again the Commission says:

> "The rates from New Orleans to Montgomery, Selma and Prattville are higher in all the classes than the rates from other points typical of the situation in the southeast to Montgomery, Selma and Prattville, where the distances are greater, *e. g.*, Brunswick, Ga., Savannah, Ga., Charleston, S. C., Wilmington, N. C., and Nashville, Tenn." (Rec. 75.)

Now in making this comparison the Commission goes over into an entirely different territory as to initial points. It leaves the Mississippi River territory and goes over toward the Atlantic Coast into Georgia, North and South Carolina, there being absolutely not a syllable of testimony to show that the conditions as to the traffic from those South Atlantic points to Montgomery and Selma were the same as from the Mississippi River points, of which New Orleans is one. The bill of complaint of the railroad company in this case specially complains of this comparison made by the Commission in its repot, and says that the conditions are substantially dissimilar; and that no question as to the reasonableness of the New Orleans-Montgomery rates, in comparison with the rates from those places in Georgia and the Carolinas was in issue before the Commission and

no testimony heard with reference thereto. (Rec. 22, clause d.) And the answer of the Commission in response to this complaint in the bill expressly admits that it did not attempt to determine the reasonableness of the rates from Brunswick, Savannah, Charleston, Wilmington, etc., to Montgomery and Selma; and says they were not in issue, and that there is *no relation* between the rates from those points to Montgomery and the rates from New Orleans to Montgomery. (Rec. 98, Clause d.)

If this is true, if it is true that there is no relation between the rates from these Georgia and Carolina points to Montgomery, on the one hand, and the rates from New Orleans to Montgomery, on the other hand, and if the Commission made no inquiry into the reasonableness of the former rates, because they were not in issue, then it is impossible to understand why the Commission reports on those rates from the Georgia and Carolina points, and compares them with the rates from New Orleans to Montgomery that are in issue in this case.

C.

Again the Commission says:

> "From New Orleans to certain stations just outside of Montgomery, on the Mobile & Ohio Railroad, the rates are less than the rates to Montgomery." (Rec., p. 75.)

Now, on this subject the bill states that these points on the Mobile & Ohio Railroad (which is not part of

complainant's system) are unimportant local points; that they do not enter into competition with Montgomery; that the traffic to them is insignificant; that no testimony was taken concerning them before the Commission; and, furthermore, that the Louisville & Nashville Railroad Company does not publish nor participate in those rates to these local points on the Mobile & Ohio Railroad, and has nothing to do with them. (Rec., 21, clause b.) And the answer of the Commission admits that the reasonableness of the rates to those local points on the Mobile & Ohio Railroad, just outside of Montgomery, was not in issue before the Commission, and that the Commission made no attempt to determine whether or not they were just or reasonable, and admits, furthermore, that the Louisville & Nashville Railroad Company does not publish nor participate in them. (Rec., 97.) And the uncontradicted testimony of Mr. Compton, traffic manager of complainant, likewise shows that the Louisville & Nashville Railroad Company has nothing to do with those rates to local points on the Mobile & Ohio, has never been consulted with respect to them, does not participate in them and has no control over them. (Rec., 202.)

Again, therefore, it is difficult to understand why the Commission should have written into its report, as part of the foundation on which it bases its conclusion that the New Orleans-Montgomery rates are unreasonable, a statement as to the rates to little local points on the Mobile & Ohio Railroad just outside of Montgomery,

which were not fixed nor participated in by the Louisville & Nashville R. R. Co., over which it had no control, the reasonableness of which was not in issue before the Commission and concerning which it made no inquiry, and which, therefore, it certainly had no right to compare with rates to Montgomery, and the traffic to which, moreover, is a mere trifle.

D.

Again the Commission says:

> "From some of the *Virginia cities* to Montgomery and Selma the rates are less than from New Orleans to Montgomery and Selma, though more than twice the distance." (Rec., 75.)

As to this, the bill and the answer properly treat this part of the report exactly as they do that part relating to the rates from the Georgia and Carolina cities, as to which the considerations are manifestly the same, and which have already been mentioned, viz:, as irrelevant. (Bill, Rec., 23, Answer, Rec., 98.)

E.

Again the Commission says:

> "The rates from *North Atlantic ports* to points in the southeastern territory basing on Montgomery are more favored when length of haul and the number of lines over which the traffic must be transported are taken into consideration." (Rec., 75.)

As to these rates also the bill makes very much the same statement as it did concerning the rates from the South Atlantic cities to Montgomery. It says that no question as to the relative reasonableness of those rates was in issue; that there was no attempt to prove what were the circumstances and conditions under which those rates were made; that the conditions were in fact very different and that they form no just basis of comparison. (Bill, Rec., 23, Clause e.) And this the answer practically admits; it admits that no testimony was taken as to the circumstances and conditions under which the rates from eastern cities were made; that no question of the comparison of those rates and the rates from New Orleans was in issue before, it, and it says it did not in any way attempt to pass on the reasonableness of those rates. (Answer, Rec., 99, Clause e.) We again ask the question, therefore, why should the Commission conclude that the New Orleans-Montgomery rate was unreasonable by comparing it with rates from the eastern cities, without any inquiry as to the reasonableness of those rates, or as to the circumstances and conditions under which they were made.

Again the Commission says:

> "The rate in cents *per ton per mile* on the average of the first six classes is much greater from New Orleans to Montgomery, Selma and Prattville than they are from Memphis, St. Louis and Louisville to said points." (Rec., 75.)

In other words, the Commission does not here say that the rates from New Orleans to Montgomery are

higher than from Memphis, St. Louis and Louisville, but, taking into consideration the *distance*, that the rate *per ton per mile* is greater. But the fact that rates are not fixed on an exact mileage basis and that the rate for carrying freight one hundred miles is not necessarily twice the same as the rate for carrying it fifty miles is so thoroughly well understood that we do not believe it is necessary to dwell on this finding of the Commission for the purpose of showing its utter inadequacy to support the Commission's conclusion.

G.

Again, referring to the Cooley Arbitration in 1886, which made a relative adjustment of rates from Ohio and Mississippi River points to points such as Montgomery in the Southeast territory, and recognizing that this adjustment, which had stood with but one modification for practically twenty-five years, would be destroyed by changing these New Orleans-Montgomery rates, unless the rates from all the other Ohio and Mississippi River points were likewise to be reduced, the Commission says that the building of new railroads and other causes *have forced many departures* from the adjustment of rates made under the Cooley Arbitration. (Complainant's Exhibit Book, p. 86.) On this subject we are compelled to say that the record simply shows that this statement is incorrect. The bill of complaint states specifically that the building of the Kansas City, Memphis & Birmingham Railroad, from Memphis to

Birmingham during the year 1887, resulting in a lowering of the rate from Memphis to Birmingham and a consequent lowering of the rates on certain classes from New Orleans to Montgomery, all of which matter was adjusted many years ago, has been the *only change* in the conditions as they existed when Judge Cooley made his arbitration, and that there have not been for many years any new or changed conditions, such as the building of new railroads, etc. (Rec., 24, Clause g.) And this allegation of the bill is completely supported by the *uncontradicted testimony of a number of witnesses.*

Thus Mr. Compton, traffic manager of the Louisville & Nashville R. R. Co., than whom there is no better posted man in traffic matters in all the southern country, explains that the building of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham did introduce a new condition into the southeastern situation, subsequent to Judge Cooley's award, and that a slight change had to be made owing to the introduction of this new factor into the problem, but that this change was made as experience developed the necessity for it on account of the altered situation, and that this change was made in 1896, fourteen years ago, and that since that time there *has not occurred any other or further fact or change in the situation* requiring any further modification of the Cooley adjustment. (Rec., 283.)

So Mr. T. C. Powell, vice-president of the Cincinnati, New Orleans & Texas Pacific Railway Company, as well as of other Southern Companies, after referring to the Cooley award, was asked if he knew of any reason

requiring a departure from the relative adjustment thus fixed, and said that he did not. (Rec., 133.)

Likewise Mr. Lincoln Green, freight traffic manager of the Southern Railway, after explaining the departure from the Cooley award necessitated by the building of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham, says this is the *only departure* that has been made from that award. (Rec., 11, 12.)

Again, Mr. J. B. Bannon, general freight agent of the New Orleans & Northeastern Railroad, says that the Cooley award has been substantially complied with by the railroads, and that trade conditions for the last twenty-four years have been built up and based upon it. (Rec., 284, 285.)

Mr. Joseph Hattendorf, assistant general freight agent of the Illinois Central Railroad, testifies to the same effect. (Rec., 305.)

And there is no testimony to the contrary, either in the testimony heard originally before the Commission or in the original testimony introduced in this case. There is absolutely no foundation in the record for the statement in the Commission's report that, since the making of the Cooley award, the building of new railroads and other causes have forced many departures from it. It is conclusively shown that the only departure that has been made from it was the departure resulting from the building of the Kansas City, Memphis & Birmingham Railroad from Memphis to Birmingham; that the change made necessary by this new condition was quickly made and that there has been no further change

since that time; the modification due to this change having been completely made fourteen years ago.

It has been suggested that the Commission's statement to the effect that the Cooley Adjustment had been frequently departed from could be justified by the fact that there have been departures from it in fixing *commodity* rates, but this can not be what the Commission intended because in its report it was not considering commodity rates at all. While originally the complaints of the New Orleans Board of Trade embraced commodity rates, yet these were very largely adjusted to the satisfaction of the parties before the matter came on for hearing by the Commission, and, therefore, the Commission did not enter upon any consideration of commodity rates in making its report. On the contrary, it expressly reserved that subject, as appears from the following language at the conclusion of its report:

> "In regard to the commodity rates attacked in these proceedings certain adjustments and changes have been made therein by the defendant since the institution thereof with the view of correcting inequalities or excessive charges found to exist, which adjustments and changes are admitted to have removed the cause of complaint to some extent. It is impracticable in the present state of the record to determine satisfactorily what other changes, if any, respecting commodity rates should be made. These cases will be retained therefore for such further investigation and consideration of commodity rates involved as the facts and circumstances may seem to require." (Record, 77.)

Commodity rates are fixed largely to suit peculiar

circumstances, requiring separate treatment of a particular commodity to suit such conditions. It might be possible by examining each case of commodity rates where a departure was made from the Cooley Adjustment, to explain just why it was made. We have, however, not done this because, as shown by the foregoing quotation from the Commission's report, the whole subject of commodity rates was practically withdrawn from the Commission's consideration, and there was no attempt, even when the case was before the Commission, to prepare the case on that subject. Neither was there any attention whatever paid to that subject in the preparation of the case in the circuit court. It is impossible, therefore, to believe that the Commission intended to state, as a basis for its decision upon the subject of *class rates* which it had under consideration, that there had been a departure from the Cooley Adjustment in fixing *commodity rates* which the Commission did not have under consideration and upon which the case had not been prepared. But if it did mean to give such a reason, then it is manifestly a wholly insufficient one.

Of course in this connection it will be remembered that it is not pretended that the facts in connection with the Cooley adjustment, whatever they may be, furnish any justification for the Commission's change in the existing rates. It is simply insisted by the Railroad Company that they furnish a reason why the rates should not be changed. In other words, there is certainly nothing in this connection which furnishes any "substantial

evidence" upon which to base the Commission's action in lowering the existing rates.

H.

The Commission next makes the following general statement:

> "The manufacturers and shippers of oil, paper, stove-pipe, tinware, galvanized tubs, furniture, soap, window glass, paints, hardware, and other articles of like kind in daily use, testified that they were unable to trade in the Montgomery and Selma territory on account of the high rates, and that upon former occasions they had mde special efferts to build up a trade with cities located in this territory and points basing thereon, but in every instance they were compelled to abandon the fight on account of better freight rate concessions from other markets though at greater distances.
>
> "With respect to practically all of the commodities above enumerated, schedules of comparative rates and distances were filed corroborating complainant's contention." (Rec., 75.)

If by this the Commission refers to *commodity* rates on these articles, it is not worth while to stop and consider this statement, because the Commission did not make any ruling on the subject of commodity rates, but expressly reserved its ruling on this character of rates as we have just explained.

But if the Commission means to say that, as to *class* rates covering the articles mentioned, the witnesses testified that they were unable to trade in Montgomery and Selma territory on account of the high rates, and that

they had made special efforts to build up trade in those cities and had been compelled to abandon the same, then we respectfully submit that the testimony before the Commission does not substantiate this statement. We submit that there was *no testimony* to support it, and we direct the court's attention to the record to substantiate this statement.

In referring to the testimony before the Commission, it will be observed that the method of taking and reporting the same was to put a witness on the stand and examine and cross-examine him (if there was any cross-examination at all) as to the Mobile case, which is called Docket No. 1310; and then when his examination in that case had been completed, to take up the Pensacola case and examine and cross-examine him, that being called Docket No. 1328; and then take up the Montgomery case, called Docket No. 1313, and examine and cross-examine him.

The court will now find that *John Munford,* the first witness put on the stand, was not examined in the Montgomery case at all. (Rec., 344.)

Likewise the second witness put on the stand, *W. A. Hodges,* was not examined in the Montgomery case at all. (Rec., 348.)

The third witness was George P. Thompson, a wholesale grocer. His testimony as to the Montgomery case begins on page 362 of the record. He says he sells goods in Montgomery and he simply assents to the statement made by Mr. Smith, counsel for the New Orleans Board of Trade, that if the rates to Montgomery were adjusted

upon a fairer basis, it would be possible to increase his business at Montgomery. He does not in fact say the rates are unfair, and he simply assents to what practically amounts to a proposition that if the rates were lower, he would make more money, which is self-evident. He seems to concede that which his counsel assumes, namely: that the rates from Memphis to Montgomery are lower thn from New Orleans to Montgomery; but if so at that time, this must have been a *commodity* rate, which has since been adjusted, because the class rates from *Memphis* to Montgomery are *higher* than they are from *New Orleans* to Montgomery. (Rec., 196.) Then in response to a long question from his counsel, comparing the rate from New Orleans to Montgomery with the rate from *Baltimore*, Maryland, to Montgomery, and asking if he does not think that there ought to be a greater difference in the two rates, the witness says: "Well, it looks that way to me. I will answer your question that way." (Rec., 364.) It is true he says as to certain canned goods, such as beans and peas, that he is "handicapped as to rates," because there are better rates from points like St. Louis and Memphis. (Rec., 364.) But here again he must be referring to commodity rates that have been adjusted, because, as we have shown, the class rates from Memphis to Montgomery are higher than they are from New Orleans.

There is nothing, therefore, in this witness' statement to show that he has been compelled to give up the Montgomery trade on account of an inability to get the rates fairly adjusted. In fact, there is nothing in his

testimony that shows the rates to be unfair; though, of course, it is true that he makes less profit on the existing rates than he would make if they were lower.

The next witness was *W. A. Hudson,* who is in the oil business, manager of the Marine Oil Company. His testimony in the New Orleans-Montgomery case begins at page 365 of the record. Asked what he had to say in regard to the Montgomery and Selma cases, he says: "I know absolutely nothing about them." (Rec., 373.)

Asked if he could do business there if the rates were reduced thirteen cents per hundred pounds (the reduction the Commission actually did subsequently make), he says he could not. Says he: "The rate would eat us up." (Rec., 375.) In other words, Montgomery is simply not a market for his business. And this is largely explained by the fact, which he states in answer to a question from Commissioner Clark, that the great bulk of the oil business which he handled comes from *Ohio fields* and *the East.* (Rec. 374.) He says not a word about having tried to get fairer rates and about having been compelled to give up the fight, because he could not do so.

The next witness is *E. C. Palmer,* a wholesale paper man. His testimony in the Montgomery case begins on page 378 of the record. But he makes no special complaint of the rates, with the possible exception that he thinks the rate from *Nashville* to Montgomery is more advantageous than the rate from New Orleans to Montgomery on paper. He was first asked to compare the rate from New Orleans to Montgomery with the rate

from *Louisville* to Montgomery. But this he says is "fair enough." (Rec., 379.) Asked to compare the rate from New Orleans to Montgomery with the rate from *Baltimore* to Montgomery, the most he is willing to say, and all he does say, is: "It seems a little out of line to me." (Rec., 380.) As said before, he does mention the fact that Nashville has a better rate, although he lays more emphasis on the advantage that Nashville has over Cincinnati, than he does upon its advantage over New Orleans. (Rec. 380.) From all of which it seems that the trouble is, not so much that New Orleans has an unfair rate, as that possibly Nashville has too advantageous a rate as compared with other surrounding cities. This witness does not say a word about being kept out of the Montgomery trade by unfair rates on paper, but on the contrary says he ships to Montgomery constantly. (Rec. 378.)

The next witness is *A. D. McBride,* connected with the National Enameling & Stamping Company. His testimony in the Montgomery case begins at page 391 of the record. He says he does not ship to Montgomery, because *Atlanta, Ga.,* has lower rates and gets the business. (Rec., 391.) But even he does not say that Atlanta has an *unfair* advantage in the rate on this class of goods, and there is no attempt anywhere to show that she has. The fact is simply stated that Atlanta has a better rate and that, therefore, this witness does not do business in Montgomery. Counsel for the Board of Trade, Mr. Smith, attempts to get the witness to say that New Orleans is treated unfairly, as compared with

St. Louis and *Louisville,* but he says in effect that he does not see that St. Louis and Louisville have any advantage in the matter, and that the only competition that amounts to anything is the Atlanta competition. (Rec., 392.) As said before, he does not say this is unjust. And there is not a word of testimony from him that he has tried to get this adjusted and failed.

The next witness is *J. W. C. Wright,* who is in the furniture business. His testimony as to the Montgomery case begins at page 401 of the record. But he knows nothing about the Montgomery case. He says he does not ship to Montgomery and can make no statement about any difficulty in getting into that trade, because he says he has not solicited the trade. (Rec., 401.)

The next witness is *P. Jung,* who represents the Crescent Bed Company, making iron beds. His simple statement is that he does not solicit business with Montgomery and does not ship there. (Rec., 405.) There is not a word about the rates being unfair, or about his having tried to adjust them.

The next witness is *S. Steinhart,* who is in the soap business. His testimony in the Montgomery case begins at page 408 of the record. He says he sells soap in Montgomery; that the rate from Nashville is only nineteen cents, whereas the rate from New Orleans is twenty-three cents. He does not say expressly whether he is referring to a class rate or a commodity rate on soap. But he must be referring to a commodity rate, because there is no class rate of twenty-three cents on any class among the New Orleans-Montgomery rates. This being true, his

testimony has no bearing on the class rates which are the only rates we are now considering. Furthermore he does not even say that the one difference he mentions is unfair, nor that he has ever made any attempt to adjust it.

The next witness is *J. W. Bray*, who deals in paints and glass. His testimony in the Montgomery case begins at page 408 of the record. His testimony is not clear. Being asked if he ships into Montgomery, he says: "I can not give you any information on that territory. We are entirely shut out of that territory." (Rec., 411.) Then, when asked by counsel for the Board of Trade if the rates are such that he is unable to ship there, he says: "Yes. It is *not a normal point in our business from New Orleans.* I mean the glass business, but the paint business we handle it entirely from St. Louis." (Rec., 411.) We confess we do not know what he means by the statement that montgomery is not a normal point in their business from New Orleans, so far as glass is concerned. So far as paint is concerned, he says that his company has a house in St. Louis and that they prefer to handle the paint business from St. Louis. (Rec., 412.) This witness, even as to the glass business, makes no statement that he considers the New Orleans-Montgomery rate as unfair or unreasonable, nor that he has ever tried to adjust it.

The next witness is *Harry Moore,* who is in the wholesale hardware business. His testimony begins on page 415. His statement simply amounts to this: that he can not compete with Louisville, St. Louis and Nashville,

because he says they are *only half the distance from the producing centers*, and therefore, they can get very much better rates on the goods from the manufacturers; and hence, he is not able to compete with them. (Rec., 415.) He does not even claim that the rates from New Orleans to Montgomery are unfair, nor does he say that he ever attempted to have them corrected.

The next witness is *George Weigand*, who is in the provision business. His testimony in the Montgomery case begins at page 421. He simply says he has never tried to do any business in Montgomery. (Rec., 192.) He makes no complaint at all, nor any claim that he ever tried to get any revision of rates to Montgomery.

The only remaining witness is *S. Odenheimer*. In his testimony he mingles the three cases as to Montgomery, Pensacola and Mobile, beginning his testimony on page 422. What he says in effect is that there are cotton mills at New Orleans and Mobile and at Montgomery, and he complains that the rates southwardly from Montgomery are lower than the rates northwardly from New Orleans, though he says the railroad companies explained this to him by saying that there are a good many empty cars going to New Orleans and no empty cars from New Orleans to Montgomery. (Rec., 423.) He also complains that the rates, from Virginia, Carolina and Georgia points are better to Montgomery than the rates from New Orleans. Here again this witness does not say whether he is speaking of class rates or commodity rates. But even assuming that he is speaking of class rates, it would seem that a very

good reason why he is not able to ship cotton goods to Montgomery is that *they have mills right in Montgomery.* (Rec., 422, 424, 198), and it would hardly seem natural that he should be able to compete with those mills. This would seem the natural explanation of why he does not do a very large business shipping cotton goods to that city.

We have thus gone through the testimony of all the shippers introduced before the Commission by the complainant, the New Orleans Board of Trade, and we submit that the statement in the Commission's report to the effect that manufacturers and shippers of oil, paper, stovepipe, tinware, galvanized tubs, furniture, soap, window glass, paints, hardware and other articles of like kind in daily use, testified that they were unable to trade in Montgomery and Selma territory and that they had tried to build up a trade there, but in every instance were compelled to abandon the fight on account of better rates, is absolutely unsupported by any testimony before the Commission. Not only do we say that it is contrary to the weight of the testimony, but we say there is absolutely no testimony to support it.

The foregoing is absolutely all of the report of the Commission bearing on the New Orleans-Montgomery case and showing its reasons for concluding that the New Orleans-Montgomery rates, established by the Railroad Company, and which had been in existence for fourteen years, were unjust and unreasonable, except the fact that prior to August 13, 1907, two years before the action of the Commission (which was on November 26, 1909), the sum of the rates from New Orleans to

Mobile, plus the rates from Mobile to Montgomery, had been less than the through rates from New Orleans to Montgomery on the classes of articles in controversy. This condition did not exist at the time the Commission took up these rates for investigation, or at the time it made its rulings. At the time the Commission had this matter under consideration the combination of rates just mentioned was not less than the through rates from New Orleans to Montgomery, and such had not been the case for more than two years.

In a brief filed for the Interstate Commerce Commission, counsel, referring to a comparison of rates maintained by the Louisville & Nashville Railroad Company from New Orleans to Montgomery with rates maintained from Memphis, St. Louis and Louisville to Montgomery, says that the New Orleans rates are greatly in excess of the rates from other cities "when proper consideration is given to the matter of distance." Of course, it is impossible to know when, *in the mind of counsel,* "proper consideration is given to the matter of distance." The Commission has not said that the difference in rates did not show proper consideration for the matter of distance. It simply said, as heretofore mentioned, that the rates from New Orleans were "higher" than those from the points mentioned north and west of Montgomery. As a matter of fact, not only are the New Orleans rates not higher but, on the contrary, the rates from the other places mentioned are all higher than those from New Orleans; and the rates from St. Louis and Louisville are very substantially

higher. (Record 551, Exhibit 6.) The rates from St. Louis, Louisville, Memphis, and New Orleans to Montgomery are respectively as follows:

Class	1	2	3	4	5	6
St. Louis	121	106	95	74	60	49
Louisville	98	87	78	62	50	41
Memphis	94	83	74	58	46	37
New Orleans	89	79	68	53	46	36

Counsel has a great deal to say in this brief about a comparison of rates *per ton per mile*, but we assume that this court fully understands that comparisons of this kind are of but little value. It is a matter of universal knowledge that for short distances rates per ton per mile are universally higher than for long distances. It is a familiar fact that where there is competition between two lines for the traffic between two places, the two roads will and must make the same rates although the distance by one may be twice the distance by the other. While, of course, some attention is given to length of haul, yet, there is no attempt in fixing rates between competitive points to measure rates by distance.

In the course of his brief, counsel makes a statement, the accuracy of which we have not been able to verify, but which we will assume to be correct, as to comparison between the rates per ton per mile on the first six classes of freight from New Orleans to Mobile, with the rates on *all classes* of freight for *all distances* in the United States. Of course, such a comparison is absolutely worthless. Not only does it compare the rates between the six highest classes of freight, with all classes, high and low, but it compares the rates on a short haul

of only 141 miles with the rates on hauls of a thousand or more miles, and as just said, such a comparison is absolutely of no value.

Counsel refers to the testimony of Mr. Smith, to whom he refers as the Commissioner of the New Orleans Board of Trade. Mr. Smith is the attorney of the New Orleans Board of Trade; he represented it on the trial before the Interstate Commerce Commission, representing it not only at the taking of evidence, but filing an elaborate brief before that Board. In the course of the trial he testified, his testimony being partly argument and partly a statement of facts. So far as the New Orleans-Montgomery case is concerned his testimony consisted simply in the filing of certain exhibits, and these are commented upon in the brief in this court for the Interstate Commerce Commission. (Printed brief page 43.) We may briefly refer to the exhibits upon which counsel comments, and which are found in the record from pages 547 to 552.

Exhibit Smith No. 2 simply shows that certain class rates from New Orleans to Montgomery are higher than from New Orleans to local stations near Montgomery *on the Mobile and Ohio Railroad.* We have already commented upon this fact, calling attention to the fact that the Mobile & Ohio Railroad is not a part of Complainant's system; that these are unimportant local points which do not enter into competition with Montgomery; that the traffic to them is insignificant and that the Louisville & Nashville Railroad Company does not publish nor participate in the rates to those local points

on the Mobile & Ohio Railroad and *has nothing to do with them;* and have further called attention to the fact that the answer of the Commission admits that the reasonableness of those rates was not in issue before the Commission; that the Commission made no attempt to determine whether or not they were unreasonable, and admits further that the Louisville & Nashville Railroad Company does not publish nor participate in them.

Speaking of Mr. Smith's exhibit No. 3, counsel says it shows that class rates to Montgomery and Selma are *nearly as great* from New Orleans as from Boston, New York, Philadelphia or Baltimore. Again we must say that of course we do not understand what, in the mind of counsel, is *"nearly as great."* But the rates from Boston, New York and Philadelphia to Montgomery are in fact much in excess of the rates from New Orleans to Montgomery. A comparison of them is as follows:

RATES TO MONTGOMERY.

Class	1	2	3	4	5	6
Boston, New York, Philadelphia	108	95	84	69	57	45
New Orleans	89	79	68	55	46	36

(Rec., 551, Ex., 6.)

In this connection, and bearing upon the question of a relation between rates and distances, the court will note the fact that the rates from Boston to Montgomery are the same as the rates from Philadelphia to Montgomery, although of course the distance from Boston is very much greater than from Philadelphia.

Mr. Smith's Exhibit No. 4 is simply a comparison

between class rates from *eastern cities* to points on the line of the *Central Railroad of Georgia* and rates from New Orleans to Montgomery, and a similar comparison between rates from these eastern cities to points on the Sea-board Air Line and on the Southern Railway, on the one hand, and rates from New Orleans to Montgomery on the other. We wholly fail to see the relevancy or value of such a comparison. The situation and conditions are so wholly different as to render such a comparison absolutely worthless.

Mr. Smith's Exhibit No. 5 deals simply with *commodity* rates which, as heretofore said, is not a matter under consideration in the present case, as the Commission expressly reserved the subject of commodity rates for further consideration and made no ruling upon them.

Mr. Smith's Exhibit No. 6 involves a comparison very similar to his exhibit No. 3 commented upon above; it simply embraces more points in the comparison, embracing a comparison of the rates to Montgomery from such points as Louisville, St. Louis and Memphis as well as from Boston, New York and Philadelphia, but we have already commented on all of these comparisons.

The last of Mr. Smith's exhibits upon which counsel comments is his exhibit No. 8, which appears to be simply a comparison of the rates *going south* from Montgomery to Mobile with the rates from Montgomery to New Orleans, commenting upon which counsel says "*when proper consideration is given to the matter of distance,*" rates are much less to Mobile than to New Orleans from Montgomery. As no complaint has ever been made of

the rates going south from Montgomery to New Orleans we wholly fail to see the relevancy of this exhibit or the comment upon it.

Before leaving the comments of counsel for the Commission on this New Orleans-Montgomery case, we must note a statement by him from which it would be inferred that the Louisville & Nashville Railroad Company had discriminated against New Orleans in favor of the rest of the world in applying a rule of not permitting a through rate to exceed any combination of intermediate local rates. No such discrimination has ever existed. Mr. Compton, the traffic manager of the Louisville & Nashville Railroad Company, in his testimony before the court examiner in the case at bar carefully explained this matter—there seeming to be some confusion in the testimony before the Commission as to what the facts were on the subject. As so much stress is laid upon this we quote the following from Mr. Compton's testimony, in which he makes this situation absolutely plain, as follows:

> "Q. 19. State whether or not it has been the custom of the Louisville & Nashville Railroad Company to protect the lowest combination of rates between such points as New Orleans and Montgomery and Selma; and if there has ever at any time been any custom or practice of protecting the lowest combination of rates between any character of points, state what the practice or custom has been.
>
> A. It has not been the custom of the Louisville & Nashville Railroad Company to protect the lowest combination of rates between such points as New Orleans and Montgomery and Selma. Under the present law and the regulations of the Interstate

Commerce Commission it would be unlawful to protect such a combination in preference to a through rate. In the trial of this case before the commission an effort was made to prove that the Louisville & Nashville Railroad Company had published a circular authorizing the protection of combination rates where less than the through rates, and that the authority embraced in such circular included points *like* New Orleans, Montgomery, and Selma; *but such was not the case.*

"The rates between all *competitive points* in the Southeast are constructed upon long-established relative bases, and when so constructed they are published as specific rates, and it has not been the custom of any line to protect between those points combination rates that are less than such through rates, for the obvious reason that such action would disturb and probably destroy the long-established relative bases referred to.

"With respect to the *non-competitive* points, such as the local stations on the Louisville & Nashville Railroad Company, the practice was somewhat different prior to the passage of the so-called Hepburn Act in 1906. The Louisville & Nashville Railroad Company many years ago adopted the policy of making rates to, from, and between its *local stations* on basis of its mileage table of rates but not higher than combinations on competitive points. In other words, the rate from Louisville, Ky., to Gallatin, Tenn., would be the mileage rate for that distance, but if a lower rate could be made by combining the rate from Louisville to Nashville, Tenn., a competitive point, with the rate from Nashville to Gallatin, the lower combination rate would have been used instead of the higher mileage rate. This was the basis, and specific rates to, from, and between *local stations* were figured out on such basis and published in what were known as *local tariffs.* But it was impossible to keep these local tariffs checked up and revised so that the rates therein

would not at any time exceed the lowest combination, because the rates between competitive points were frequently changing. It therefore frequently happened that the specific rates published to, from and between local stations could be reduced on some competitive point combination before the local tariffs could be revised to take care of it, and as it was our policy to give the people at our local stations the benefit of lowest combination rates, we issued a circular in 1889 authorizing our agents to protect such combinations in preference to the published through rates, and this authority was continued until April 6, 1907, when it was cancelled and withdrawn because of certain rulings of the commission providing in effect that combination rates could not be protected in the favor of specific through rates.

"But the sole purpose of that authority was to enable our *local* stations to enjoy the benefit of lowest combination while our local tariffs were in process of revision, and it was *never the intention* that it *should have any application between competitive points.* We are perfectly willing to apply it from a competitive point to a local or non-competitive station, or from such local or non-competitive station to a competitive point, or from one local or non-competitive station to another local or non-competitive station, because in neither of these instances was there any relative adjustment of rates to be disrupted and distroyed by such action; but I repeat that it never was the custom of the Louisville & Nashville Railroad Company or of any other line, so far as I am aware, to recognize such combination rates between competitive points where specific through rates, constructed on relative bases, were in effect." (Record, 193-195.)

From this it is made perfectly clear that in *no tariff* of the Louisville & Nashville Railroad Company did it ever carry any rule for the protection of combinations

on rates between competitive points; but that this rule only applied to and from and between local stations. And thus we see that New Orleans and Montgomery were treated as all *similar places*. There was no discrimination whatever against them in favor of other competitive points.

We have by what has gone before called the courts attention to absolutely all which appears in the report of the Commission as to the justification of their order reducing the long existing rates from New Orleans to Montgomery which had been established by the railroad company; and we have endeavored to respond also to the arguments of counsel for the commission in endeavoring to bolster up the report of the Commission on this subject. And we think the court will see that the facts stated by the Commission constitute absolutely no justification for its action in reducing these rates. The facts which the Commission states are either absolutely without any support in the record, and, on the contrary are shown to be incorrect by uncontradicted testimony in the record, or are statements of fact upon irrelevant matters, such as the existence of certain rates between other points where there was nothing to show that the conditions were similar, matters that were not in issue before the Commission, many of them being matters which the Commission in its answer in this case treats as irrelevant, and which furnish absolutely no basis for concluding that the New Orleans-Montgomery rates were unreasonable.

COMPLAINANT'S TESTIMONY IN MONTGOMERY CASE.

We, however, do not rely upon the simple absence of anything in the record to justify the Commission's action. We have gone further, and have affirmatively shown by the uncontradicted testimony of men of high character and of the widest experience in traffic matters in the South that the rates which had so long existed were not unjust nor unreasonable,but were just and reasonable, a result of competition, and that the rates as reduced by the Commission were unjust and unreasonable, in that they were too low. And in expressing their opinions to this effect they give *their reasons* for so thinking.

Mr. C. B. Compton is the traffic manager of the Louisville & Nashville Railroad Company. He has been connected with transportation service in the South for thirty-nine years. He has given his entire mature life to this work. He has seen the railroad system in the South grow from small beginnings to its present condition. He gives the history of these rates from New Orleans to Montgomery, showing that at the time the Commission made its reduction they were lower than they had been for the preceding twenty years, except during a period of a few weeks in 1894, when a rate war was in progress. He shows that as they existed when this reduction was made they were practically the same as they had been for fourteen years. When asked as to their reasonableness, he says they were just and reasonable and gives his reasons as follows:

"Because, first, they had permitted a free movement of traffic thereunder during the long period of years that they had been in effect; second, they were as low as, or lower than the rates charged for similar distances between other competitive points in the South" (in proving which he files certain exhibits making comparisons); "third, they were less than would result from the application of the company's local distance scale for similar distances, which local scale is just and reasonable in and of itself" (this local scale being a scale of rates which is based on mere distance and which prevails where there are not special conditions to modify it); "fourth, they were a vitally essential part of the reasonable relative adjustment of rates from Ohio and Mississippi River crossings to Montgomery and Selma and other interior southern jobbing centers, under which the rates from each of said Ohio and Mississippi River crossings bears a certain fixed relationship to the rates from each of the other Ohio and Mississippi River crossings * * * which said relative adjustment of rates was fixed by arbitration in 1886 and has been observed substantially without change ever since." (Record, 182.)

Mr. T. C. Powell, of the Cincinnati Southern, who has been in charge of the making of freight rates through southern territory for more than twenty years, says that in his judgment the rates fixed by the Commission, to the extent that they are less than pre-existing rates, are unreasonably low, because, says he, "the rates fixed by the carriers are the result of competitive conditions, the result of the relative adjustment of rates to Montgomery from various parts of the country, because the rates fixed by the carriers have developed traffic from New Orleans to Montgomery." (Record, 129.) He also calls atten-

tion to the facts that, assuming the rate on first-class goods to be fair, which the Commission does assume, because it does not change the rate, the other rates which are lowered by the Commission are manifestly too low. (Record, 129.) He calls attention to the fact that the rates on the fifth and sixth classes of goods are the same, to-wit: thirty-five cents to the one hundred pounds in each case, and says there is absolutely no justification in establishing the same rate on these two classes; that the fixing of the same rate on the two classes makes the classification useless. And then speaking of the fact that the Commission makes the rate on second-class goods seventy-seven cents, and on third class, fifty-five cents, a drop of twenty-two cents, Mr. Powell says:

> "Throughout the territory south of the Ohio River and east of the Mississippi River a comparison of rates between important points shows that *in no similar case is there such disproportion between the two classes.*" (Record, 129.)

And speaking generally of the New Orleans-Montgomery rates as fixed and maintained by the railroad for many years prior to the Commission's action, he says:

> "They have been in effect for years. As assistant general freight agent of the New Orleans & Northeastern and in charge of rates from New Orleans over that line for a period of years, I am conversant with the conditions which brought about the rates from New Orleans to Montgomery, and I know that those rates are the result of competition as between carriers and between markets, and for that reason I believe them to be reasonably low." (Record, 130.)

Mr. Powell further says that the reduction of these rates from New Orleans to Montgomery, if continued in effect, will inevitably reduce the rates to other commercial centers in the South (giving in this connection quite a full explanation of the rate system.) (Record, 134.)

Mr. Lincoln Green, freight traffic manager of the Southern Railway, has been engaged in the railway service in the South for more than twenty years, and he testifies that in his opinion the railroad rates from New Orleans to Montgomery, as they existed prior to the Commission's action, were reasonably low, and that the reduced rates established by the Commission are unreasonably low. He says:

> "The rates from New Orleans to Montgomery, as in effect prior to April 15, 1910, were established as a result of competition, not only between the rail carriers serving New Orleans and Montgomery, but competition also by the all-water route from New Orleans via Mobile and the competition between the city of New Orleans and the carriers serving that city and the Mississippi River crossings, namely, Vicksburg, (Miss.), Memphis, (Tenn.) and the Ohio River crossings, namely, Cairo, (Ill.), Evansville, (Ind.), Louisville, (Ky.) and Cincinnati, (Ohio) striving for the trade of Montgomery. The rates from New Orleans to Montgomery are a part of the great system of rates applying from and through the river crossings which I have named, and are the result of most progressive competition, carriers and of market. They are lower than the rates in the Southern territory where a corresponding service is involved and where there is an absence of such competition." (Record, 157.)

Mr. Green then gives a huge number of rates between other places, illustrating his statement, and shows that the rates of the Southern Railway, both in Alabama and Georgia, as *fixed by the railroad commissions* of those two States, for a distance of 320 miles on the classes 1, 2, 3, 4, 5, 6 and E are higher than the railroad rates from New Orleans to Montgomery (a distance of 321 miles) as they existed prior to the Commission's action. (Record, 158.)

Mr. Green also corroborates Mr. Powell and Mr. Compton in the statement that the inevitable result of reducing these rates from New Orleans to Montgomery will be to force a reduction of rates from the other Mississippi River and Ohio River crossings into this territory, so that the effect will be widespread. (Record, 161.)

Mr. Green also corroborates Mr. Powell as to the relation of these rates fixed by the Commission to each other and says they are not properly adjusted; that there is no reason for the differences fixed by the Commission. (Record, 157, 163.)

It would too greatly extend this brief to quote elaborately from all the witnesses. It must suffice to say that Mr. J. R. Dumas, the general freight agent of the New Orleans & Northeastern Railroad and other railroads mentioned, says the rates from New Orleans to Montgomery, as maintained by the railroads prior to the Commission's action, were just and reasonable "not only by comparison with other rates for similar distances and conditions considered in rate adjustment, but because they are the result of years of competition between car-

riers from different markets to the same territory." (Record, 285.)

Mr. Joseph Hattendorf, assistant general freight agent of the Illinois Central and of the Yazoo & Mississippi Valley railroads, who has been connected with the traffic department of these roads for eighteen years, says these railroad rates were fair and reasonable. Says he:

> "I have compared the rates with those in force between other points in the South where traffic is handled under practically the same conditions. I have also compared the rates with those in force from other points of origin, some on the roads which I represent, to Montgomery and other points in Southeastern territory, and relatively find the rates low and reasonable." (Record, 298.)

What then do we find the situation as shown by this record? The Commission is required by law, as we have seen, to make a report in writing showing the foundation of its order, the reasons for making the order; and in this case it has attempted to do so, and we see from a careful examination of its report that the facts asserted by it with reference to the New Orleans-Montgomery case, and which are supposed to justify its action in reducing the rates on certain classes of goods, are either absolutely unsupp[illegible] the testimony, and, on the other hand, affirmatively disproved by the uncontradicted testimony of reputable witnesses, or they are wholy irrelevant and inconsequential matters that could not properly be taken into consideration. We find further that the Railroad Company has introduced the testimony, not only of its own traffic manager, who is a man of high character and

long experience, but the testimony of men high in the employment of other railroads in the South, men of mature judgment and unquestioned integrity, all of whom testify that the rates as maintained are the result of sharp competition between carriers and between markets; that they are as low as, or lower than, other rates in the South under similar conditions; that business has grown under them; that they are fair and reasonable; and that to lower them would disrupt the entire rate system which has existed for many years and bring about great confusion and loss.

In addition to all this we desire before this brief is closed to call the court's attention to certain general considerations, such as the increase in the cost of labor and material and taxes, etc., which has taken place in the last fifteen or twenty years, showing, in addition to the facts already shown, how inopportune and unfair was the reduction of these rates at the time the Commission made them. But we will reserve these general considerations for the close of the brief after considering the other cases to which they are equally applicable.

In conclusion, therefore, on the New Orleans-Montgomery case, we submit to the court that the Commission had absolutely nothing upon which to base its conclusion that the rates on Classes 2, 3, 4, 5, 6 and E from New Orleans to Montgomery, as they existed and had existed for many years past at the time this Commission acted, were unjust or unreasonable; that its mere declaration to that effect, without any evidence to support it, and with all the evidence contradicting it, does not have

to be taken as final and conclusive, but, on the contrary, must be rejected by the Court as being wholly without justification. And from this conclusion necessarily follows the conclusion that the rates fixed by the Commission can not be sustained, and that the Commerce Court was correct in so holding.

We now pass to the next case.

NEW ORLEANS-MOBILE CASE.

We turn back to the report of the Commission in which it purports to state the facts justifying its conclusion that the rates in existence from New Orleans to Mobile, at the time of the Commission's inquiry and action, were unjust and unreasonable and justifying its reduction of the same.

The great fact which is emphasized in this case is that the rates from New Orleans to Mobile, as maintained by the railroad companies practically from the time of the building of the railroad from New Orleans to Mobile, down to August 13, 1907, were increased on August 13, 1907, and that the Commission by its action herein complained of simply reduced those rates to what they had been previously. The following table shows the rates as they were raised and fixed by the Railroad Company on August 13, 1907, and the rates as they had been previous to that date, and to which the Commission reduced them when it acted, which reduction became effective April 15, 1910.

NEW ORLEANS TO MOBILE.

Class	1	2	3	4	5	6	A	B	C	D	E	H	F
August 13, 1907	50	39	38	31	27	16	12	15	12½	10	20	18	25
Prior to August 13, 1907	50	37	25	18	15	15	12	15	12½	10	15	18	25
		2	13	13	12	1					5		

(Record, 71.)

As bearing upon this admitted fact that the rates were raised by the Railroad Company in August, 1907, we must remember that this court has expressly held this is no evidence that the increased rates are unreasonable. In Interstate Com. v. Chicago & Great Western R'y. Co., 209 U. S. the court, through Mr. Justice Brewer, said:

> "It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers." (119.)

And the Commission itself in its report gives the explanation of why these rates from New Orleans to Mobile were ultimately raised from the figures at which they had previously been fixed; that explanation being that those rates had been originally fixed in active competition with

water transportation; but that this transportation gradually declined and had ultimately practically ceased to exist when the Railroad Company made the increase in rates in 1907. And in quoting from the Commission's report on this subject, we call attention in advance to the fact that it shows that *the bulk of the freight carried between those two cities is in the third, fourth and fifth classes,* and it further shows that *on these three classes of freight, under which the bulk of the freight is carried, the Commission has actually reduced the rates to figures below the water rates as they existed in 1907* on the Mobile & Gulf Steamship Company's line, thus *forcing the Railroad Company to carry the bulk of the freight from New Orleans to Mobile at less than a steamship company charged for it.* The report of the Commission in this connection is as follows:

> "Transportation between New Orleans, Mobile and Pensacola was conducted wholly by water carriers until about 1871, when carriage by rail was inaugurated, and shortly thereafter the defendant acquired the railroad which had been built from New Orleans to Mobile and Pensacola, and has operated the same continuously to the present time as a part of its system.
>
> "The earliest class rates applying via this route, as shown by this record, were established in 1887, and they remained substantially unchanged until the said advance of August 13, 1907. Comparison of water rates issued by the Mobile & Gulf Steamship Company, effective in 1907, and the rail rates prior to the said advance, from New Orleans to Mobile, is shown as follows:

Class	1	2	3	4	5	6	A	B	C	D	E	H	F
Rail Rates	50	37	25	18	15	15	12	15	12½	10	15	18	25
Water Rates	44	33	31	27	23	12	10	12	13	8	16	14	10

"In the competition between the rail and water lines the tariffs show the rail rates generally higher than the water rates, *except in the third, fourth and fifth classes, under which classes the bulk of the freight carried between these two cities would move.* There was some testimony to the effect that formerly the rail rates were not maintained as published when competition was severe with the water lines, neither is it certain that the rates announced by the water lines were maintained. At all events, *water transportation gradually declined,* and at the date of the hearing, carriage by water was very infrequent and cut but little figure as a competitor with the defendant. Some of the reasons for the decline and practical disappearance of water transportation, as disclosed by the testimony in this case, in addition to the results of the competition with defendant, are the slower service of the water lines, the labor troubles in connection with loading and unloading the vessels, inconvenient loading and unloading places for shippers as compared with centrally located freight stations and branch railroads to warehouses and the want of proper docking facilities." (Record, 73.) (Our itallics.)

Passing from this statement which the Commission itself makes and which is a most satisfactory explanation of why these rates were originally so low, and which shows that the original depressing cause has ceased to exist, we come to the statement by the Commission of its reasons for nullifying the advance which the railroad company made in certain of these rates and for forcing them back to what they had been when there was active competition.

A.

The Commission says:

> "The advances shown from New Orleans to Mobile of 2 cents or, second class, 13 on the third, 13 on the fourth, 12 on the fifth, 1 on the sixth, and 5 on the Class E, were severely felt by certain shippers in New Orleans shipping to Mobile nd adjacent territory, and especially those engaged in jobbing canned goods, lard, flour, coffee, oil, crackers, pickles, vinegar, beans etc." (Record, 73.)

As to this statement by the Commission, we stop only to say that any increase in a freight rate will be "felt" by a shipper. It needs no argument to show that a shipper will not make as much profit out of a shipment of goods if he has to pay 15 cents a pound as he will if he can ship for ten cents a pound. But this does not show that the 15-cent rate is unjust or unreasonable. It only shows that it is higher, which is conceded. Therefore, to say that an increase in rates is "severely felt" by certain shippers is absolutely no reason for saying that it is unjust or unreasonable or for compelling a reduction of it. An increase in the cost of raw material or in wages would be "severely felt," but this would not show such increase to be unjust or unreasonable.

The Commission then proceeds:

> "New Orleans is an important distributing market for canned beans, handling perhaps from 400 to 500 carloads per year, and the increase in the rate on this article is extremely burdensome, if not practically prohibitory of shipping *into New Orleans* and *out to Mobile.*" (Record, 73.)

Now, we ask the court to stop and consider a moment that statement. Why should a freight rate on canned beans from New Orleans to Mobile be fixed so that merchants in New Orleans may profitably ship such a commodity into New Orleans and out to Mobile? New Orleans and Mobile are both jobbing points and they *get their supplies of canned beans from the same markets and at the same freight rates.* Why then should such canned beans be shipped into New Orleans and out to Mobile, and why should the rate from New Orleans to Mobile be so adjusted as to try to make this possible? Mr. Compton on this subject says:

> "Both the cities of Mobile and New Orleans are important jobbing points. The rates from the producing points of these articles (referring to canned beans) of both New Orleans and Mobile are the same. They are rival jobbing points and there is no reason why the rate should be reduced from New Orleans to Mobile in order that New Orleans might be able to sell Mobile." (Record, 240.)

B.

Again the Commission says:

> "The rate on paper was advanced from 18 to 31 cents and that on stovepipe, tinware, tubs and galvanized iron tubs from 18 to 31 cents, and it was shown that the manufacturers would have to absorb this advance." (Record, 73.)

But on this subject the same criticism of the Commission's finding is to be made that we have just made on its finding as to canned beans. Mr. Compton was asked:

> "Please state whether or not sonsidering the sources of supply of paper, stovepipes, tinware, tubs

and galvanized iron tubs, and the situation of New Orleans and Mobile, if there is any reason why goods of that character should be shipped into New Orleans and out to Mobile?"

And he answers:

"I know of no reason why they should be. They are rival jobbing cities and *draw their supplies from the same source.*" (Record, 240.)

Moreover the Commission's statement on this subject is wholly incorrect as a statement of the testimony. The only witness who testified as to the paper industry was Mr. E. C. Palmer. But he *did not testify* that the manufacturers *would have to absorb the advance on the rates on paper.* And, testifying some eight months after this advance had gone into effect, he does expressly say: "*At the present time I do not think we have been materially injured.*" (Record, 376.) It is true he fears possible injury in the future, but, as just said, he expressly makes the statement just quoted as to the effect of the order up to the time he testified, when it had been in effect eight months, to-wit: from August, 1907, to the first of May, 1908.

The witness who testified as to "stovepipe, tinware, tubs, and galvanized iron tubs," was Mr. A. D. McBride, who represents the National Enameling Company. And so far from his testifying that the manufacturers have been compelled to absorb the advance in freight on these articles, he testified *expressly to the contrary,* and says that the manufacturers have not been compelled to absorb this advance. He says:

> "Nobody in Mobile has declined to buy stuff from us because of the increased rate, and we have not yet absorbed that." (Record, 386.)

It is true he fears that under certain conditions in the future, he might be compelled to absorb the advance; but he has not been compelled to to do so up to the time of the hearing, when the advance had been in effect eight months. And furthermore, like Mr. Palmer already referred to, Mr. McBride expressly says: "I do not know that we have lost any business directly by the advance in rates" (Record, 386.)

The Commission's statement of the effect of the testimony on this subject is thus seen to be wholly incorrect and, furthermore, as said in the beginning, New Orleans and Mobile buy these goods from the same source of supply, and get them at the same rates of freight, and there is no reason why rates from New Orleans to Mobile should be so adjusted as to enable New Orleans profitably to supply Mobile with these goods.

Again, the Commission says:

> "It was also shown that the advance of the rates on furniture, iron beds, etc., practically closed out the business with Mobile, as better rates were made from other manufacturing points, such as Atlanta, High Point, and Winston-Salem, N. C." (Record, 74.)

This statement of the Commission is a simple error of fact. There was no proof to show it to be true, and the uncontradicted proof introduced in the present record shows it is not true in any particular. Mr. Compton

in his testimony (wholly uncontradicted) gives the rates from Atlanta, High-Point and Winston-Salem to Mobile on the class of articles here referred to by the Commission, and compares them with the rates on the same class of articles from New Orleans to Mobile, and with the exception of one single case, where a rate from New Orleans to Mobile is one cent lower than the rate from New Orleans to Mobile, all of the rates from all three points mentioned, Atlanta, High Point, and Winston-Salem, on the classes of articles here designated, are not only higher, but in most cases very materially higher, than the rates on those articles from New Orleans to Mobile. (Record, 239.)

D.

Again, the Commission says:

> "The rates on bags, burlap, gunny and jute were advanced, L. C. L., from 15 to 27 cents, and this was vigorously opposed. Strong protest on account of alleged discrimination against New Orleans was made with reference to cotton goods, it being asserted that other manufacturing points are given more favorable rates." (Record, 74.)

Then follows a statement of rates from Atlantic points, New York, Boston, and points in Virginia, and Columbus, Ga., a comparison to which we have already referred, and which we have shown is no basis for holding the New Orleans-Montgomery, or the New Orleans-Mobile rates to be unjust, because the conditions are not shown to be the same. On the contrary they are very

different. They are not in issue, and the Commission expressly says in its answer that it has not determined whether they are reasonable or not. We may further say in this connection that the fact that the increase in these rates "was vigorously opposed," or that "strong protest was made" is surely no reason for holding that the rates are unjust and unreasonable, or for reducing them.

There is one statement in the report that in many other instances on both class and commodity rates, the advances caused serious interference with business and have produced loud protest on the part of merchants shipping from New Orleans to Mobile and points basing thereon. (Record, 74.) This statement is so extremely general that it is impossible to meet it, and we are compelled to content ourselves with an examination of the specific statement made in the report, as we shall continue to do.

E.

The Commission then has this statement, to-wit:

> "The rates from New Orleans to Mobile and Pensacola have been in effect, substantially unchanged, for over twenty years, and there was no evidence that they were not compensatory." (Record, 74.)

With reference to this statement it must be remembered, as pointed out heretofore, that at the time of this trial before the Interstate Commerce Commission, the new rates were in force—not the old rates—and these new

rates were being attacked as to their reasonableness by the New Orleans Board of Trade. It had assumed the burden of showing those rates to be unreasonable. Now the Commission, as a reason for holding the new rates, the existing rates, to be unreasonable, says *the defendant* in the proceeding did not show that the old rates were not compensatory—in other words, did not show that the old rates were less than the cost of service. To have made such a showing, it would have been necessary to show what the cost of service was for carrying those particular classes of goods between those two points. This would have been an impossibility, as the proof in this case shows and as the Commission evidently believes. And yet the failure of the company, which was the defendant in the proceeding, to do this impossible thing, and to show the cost of service as compared with the pre-existing rates, is given by the Commission as a ground for holding the new rates to be unreasonably high. The Company did show that the old rates were made in bitter competition with water transportation, and that this had disappeared; all of which the Commission itself admits.

F.

The Commission then proceeds with reference to these rates from New Orleans to Mobile, as they had existed prior to the raise, as follows:

> "They also exceed the rates from New Orleans to other water transportation points, *e. g.*, Natchez,

Vicksburg, Greenville, and Memphis, where the distances are much greater." (Exhibit Book, 33.)

In other words, the Commission here states as a fact that these rates from New Orleans, as they had existed for a number of years prior to the raise in them which the Company made on August 13, 1907, and which the Commission ordered to be restored, were higher than the rates from New Orleans to Natchez, Vicksburg, Greenville and Memphis. Now not only does the record fail to substantiate this statement, but the uncontradicted testimony shows that exactly the opposite is true. Mr. Compton's attention was called to this statement and he was asked if it is true, to which his response is:

> "The statement is not true. The rates ordered to be established from New Orleans to other water transportation points, viz.: Mobile, are lower than the rates on the same classes from New Orleans to Natchez, Vicksburg, Greenville and Memphis in every case but one, and in the one exception the rates are the same.

I show comparison below:

Class	2	3	4	5	6	E
New Orleans to Mobile, as ordered by Commission	37	25	18	15	15	15
New Orleans to Natchez, Vicksburg, Greenville and Memphis	40	32	25	20	17	15

(Rec. 218.)

Thus it appears that instead of the rates from New Orleans to Mobile being higher than the rates to Natchez, Vicksburg, Greenville and Memphis, they are substan-

tially lower on every class involved, except Class E, as to which they are the same.

G.

The next statement in the Commission's report as to rates is as follows:

> "They also exceed the rates from Nashville, Memphis, Cincinnati, and Louisville to points where the distances are approximately the same." (Record, 74.)

Again, there is no evidence to substantiate this statement, on the contrary the uncontradicted testimony shows the opposite to be true. This language of the Commission was read to Mr. Compton, and he was asked to state whether or not it is true and to give a comparison between the rates from New Orleans to Mobile and the rates from such places as Nashville, Memphis, Cincinnati and Louisville to other points approximately the same distance as that from New Orleans to Mobile, and Mr. Compton's answer is as follows:

> "The decision gives no information whatsoever as to the rates from Nashville, Memphis, Cincinnati and Louisville that the Commission used as the basis for its statement, and therefore we have not been afforded a fair opportunity, or any opportunity at all, to verify the said rates and, if they exist, to explain any differences between the conditions determining or affecting them and those determining or affecting the rates from New Orleans to Mobile. From my general knowledge of the rate situation in the territory south of the Ohio and east of the Mississippi

rivers, I do not believe the statement to be either generally or approximately true.

"I now file Compton Exhibit No. 5 showing comparison between the rates ordered to be established by the Commission from New Orleans to Mobile and the rates charged from Cincinnati, Louisville, Mempoints, similar distances apart, and this exhibit shows 22 instances where the rates from Nashville for distances less than or approximately the distance from New Orleans to Mobile are materially higher than the rates from New Orleans to Mobile, 23 such instances from Memphis, 7 such instances from Cincinnati, and 12 such instances from Louisville.

"I also beg to call attention to the following additional instances where the rates from Cincinnati, Louisville, Nashville, and Memphis to points not less than 125 or more than 160 miles distant are higher than the rates established from New Orleans to Mobile under the Commission's order." (Record, 219.)

The witness then proceeds to give these additional instances here referred to, followed by his Exhibit No. 4 showing the number of cases to which he testifies.

H.

The next and last statement made by the Commission on the subject of the New Orleans-Mobile rates is that the rates from New Orleans eastwardly to Mobile are higher than the rates from Mobile westwardly to New Orleans. This is true. But it has often been recognized by the Commission itself that the fact that a rate is higher in one direction than the other does not show the higher rate to be unreasonable. Duncan v. Atchinson, etc., R. Co., 6 I. C. R. 103; McLoon v. B. & M. R. Co.,

9 I. C. C. R. 642; Weil v. Pa. R. Co., 11 I. C. C. R. 627. Practically every witness who spoke of the rate from Mobile to New Orleans being lower than from New Orleans to Mobile admitted that there was *no substantial movement* in his line of goods *from Mobile to New Orleans;* so he was not hurt. In this connection, however, Mr. Compton says that as a matter of fact the rates from Mobile to New Orleans ought to be raised. (Record, 223.)

We have now gone through the Commission's entire report on the subject of the New Orleans-Mobile rates and have called attention to every fact which it states as a reason for declaring that the rates which it found in existence from New Orleans to Mobile were unreasonable, and for fixing lower rates. It is certainly fair to assume that the statements made in this report are the best that can be made by the Commission as the reasons for its action. The very purpose of the law in requiring a report in writing to be made in connection with the Commission's order is that it may be seen what were the reasons for the order. And we submit that we have shown by a consideration of these statements in the report that they furnish absolutely no foundation for the conclusion reached by the Commission. They are either wholly erroneous in fact, or they are irrelevant. And we conclude this consideration of the Commission's report on these New Orleans-Mobile rates by again calling the court's attention to the fact heretofore mentioned that, according to the Commission's own statement, *the bulk of the freight carried between these two cities moves*

under the 3rd, 4th and 5th classes; and that the order of the Commission actually reduced the railroad rates on those classes to figures materially lower than the water rates which were then prevailing on those same classes. The water rates on these classes 3, 4 and 5 from New Orleans to Mobile were respectively 31, 27 and 23 cents, while the Commission reduced the rail rates to 25, 18 and 15 cents. (Record, 73.)

As in the New Orleans-Montgomery case, so in this New Orleans-Mobile case, counsel for the Commission attempts in his brief to reinforce the report of the Commission (Brief, p. 26.), and we will briefly refer to his comments.

After giving the distance to Mobile respectively from New Orleans, Memphis and St. Louis he says that "notwithstanding the disparities in distances above given these comparisons show that *from Memphis in many instances* and *from St. Louis in some cases,* the rates are *lower than from New Orleans,* and that, *when proper consideration is given to the matter of distance,* New Orleans rates in all cases are greatly in excess of the rates from the other two cities." He then adds: "The comparisons above mentioned refer to class rates from New Orleans and to class and commodity rates from Memphis and St. Louis, and in its answer to said petition the Louisville & Nashville admit that those comparisons are substantially correct."

The language above quoted from the brief of counsel would certainly lead one to believe, and it seems clearly to say, that from Memphis in many cases, and from St.

Louis in some cases, the *class* rates are *lower than from New Orleans.* (So far as commodity rates are concerned, they are, as we have seen, wholly immaterial in this case) but this statement as a comparison between class rates is entirely incorrect, as a simple reference to the portion of the record referred to by counsel (Record, 37-41.) will immediately show. A table on page 41 of the record (which is a part of the complaint of the New Orleans Board of Trade before the Commission) shows a comparison of rates respectively from St. Louis, Memphis and New Orleans to Mobile on the first six classes of freight to be as follows:

Class	1	2	3	4	5	6
St. Louis	90	75	65	54	40	35
Memphis	65	54	47	35	28	25
New Orleans	50	39	38	31	27	16

As to counsel's extensive comment on the changes in commodity rates, we have nothing to say because, as frequently said heretofore, this whole subject of commodity rates was reserved by the Commission, and they have no bearing upon the present case which relates wholly to class rates.

Counsel refers to the testimony of Mr. Smith, the attorney for the New Orleans Board of Trade. Reading this portion of Mr. Smith's testimony, referring to the New Orleans-Mobile case (Record, 445-453) it will be seen that his testimony is partly the argument of a lawyer and partly a filing of exhibits. Commenting on this testimony counsel for the Commission says that Mr. Smith shows that class rates from New Orleans to Mobile

made effective August 13, 1907, were higher, comparatively, than the rates from New Orleans to points other than Mobile on the line of the L. & N. The only thing we can find in Mr. Smith's testimony bearing upon this subject is a statement that the rates from New Orleans to Mobile established August 13, 1907, are a few cents per hundred pounds higher than the rates from New Orleans to three or four small points which he mentions as being near Mobile, to-wit: Magazine, Dixie Mill Company, Bay City Lumber Company and Baird Lumber Company, being points east of Mobile, and to Lee, Gentily, Milneburg and Sterns Factory, points west of Mobile. These are, as the names indicate, merely small places—several of them being apparently mere single plants—near Mobile, to which probably the rates were not all re-adjusted promptly at the same time that the rates from New Orleans to Mobile were re-adjusted. There is absolutely nothing to show that the shipments to those points were of any magnitude or significance.

Again counsel says, commenting on Mr. Smith's testimony, that he shows that the rates from New Orleans to Mobile are "much higher, comparatively, than the rates in effect from New Orleans to points on lines of railway other than those operated by the L. & N." We can find no such statement in Mr. Smith's testimony, even if it were material. We do find the statement (Record 447) to the effect that rates *from Memphis* to points on the line of the Mobile, Jackson, Kansas City Railroad are in some cases less than the rates *from New Orleans* to these *same points* on that road. This is not

a comparison of the rates from New Orleans to Mobile with rates from New Orleans to points on the Mobile, Jackson and Kansas road, but is simply a comparison between Memphis and New Orleans to points on the last named road.

Again counsel says that Mr. Smith's testimony shows "that rates *from Mobile* to points in the southeastern territory here involved are lower than rates on like articles from New Orleans to points in said territory." But we wholly fail to see how this, if true, has any bearing on the reasonableness of the rates from *New Orleans to Mobile.*

As to counsel's comment upon the testimony of Mr. Smith showing that it is the practice of carriers to make the rates the same in both directions, though the Louisville & Nashville Railroad when it raised the rates from New Orleans to Mobile failed to raise those from Mobile to New Orleans, we have already called attention to the fact that the Commission itself has frequently recognized that the fact that one rate exists from point A to point B by no means shows that the same rate should exist from point B to point A, and we have also called attention to the fact that the witnesses introduced by the Board of Trade admitted that there was no substantial traffic from Mobile to New Orleans. However, it is a fact that Mr. Compton, traffic manager of the complainant, says he thinks the rates from Mobile to New Orleans ought to be raised.

We have not attempted to answer the brief of counsel sentence by sentence, because to do so would make this

brief inexcusably long. We have simply attempted to answer such portions of it as have not been covered in other parts of our brief, and those portions which dealt with figures where we thought an explanation would be of value to the court.

COMPLAINANT'S TESTIMONY IN THE MOBILE CASE.

The complainant, however, has not relied simply upon the absolute insufficiency of the report of the Commission to support its own order, but has affirmatively shown by the same witnesses as those heretofore referred to in speaking of the New Orleans-Montgomery case, that these New Orleans-Mobile rates, as they were fixed by the Railroad Company on August 13, 1907, and which the Commission found in existence, were just and reasonable rates. And that the condition, therefore, did not exist which is the only condition upon which the Commission is authorized by the statute to make a change in rates.

Mr. T. C. Powell of the Cincinnati Southern, says these rates, as fixed by the Commission, do not represent adequate compensation for the service performed from New Orleans to Mobile. He then says:

> "There are other points similarly situated throughout the southern territory which can be used as a measure of these rates established by the Commission."

He thereupon gives a number of cases throughout the South illustrative of this statement, in each of which

the rates are materially higher than the rates from New Orleans to Mobile. And of these rates, he says:

> "I have selected these points for comparison because in all substantial particulars, except for the fact that both New Orleans and Mobile are located on navigable waters, the commercial conditions are as nearly as possible identical."(Record, 123, 124, 125.)

Mr. Powell then takes up the several rates fixed by the Commission and shows that not only are they intrinsically and of themselves too low, but that the relation between the rates on the different classes, thus fixed, is manifestly improper. Thus he says that the 3rd class rate is 12 cents per 100 pounds less than the 2nd class rate, which is nearly one-third of the 2nd class rate and nearly 50 per cent of the 3rd class, which great drop from the 2nd to the 3rd class rate he thinks is wholly unjustifiable. Likewise he calls attention to the fact that the 5th and 6th class rates are exactly the same, 15 cents per 100 pounds. And he says if 15 cents is a proper rate for the 6th class, it is manifestly too low for the 5th class. (Record, 124, 125.) Speaking further as to the history of these New Orleans-Mobile rates, Mr. Powell says:

> "I know that the rates from New Orleans to Mobile were fixed on the basis of water competition. I know that originally the only means of transportation between New Orleans and Mobile was by vessel. I know that the rates so fixed from New Orleans to Mobile in competition with the boats plying between those ports were in some cases so low as to make business unprofitable for the line operating from New Orleans to Mobile." (Record, 126.)

Mr. Powell further states that the water navigation from New Orleans to Mobile is reasonably safe; so much so that steamers plying between those ports are constructed in ship yards on the Ohio River and steamed down the Ohio and Mississippi to the Gulf for that service; that there are no natural causes why there should not be a line of boats between those ports; and that, according to experience in other parts of the country, the immediate effect of advancing railroad rates beyond a reasonable figure would be to re-establish water service between these points. (Record, 139.) In other words, if the rates as raised by the railroad company in August, 1907, had been unreasonably high, the immediate effect would have been to re-establish water service between those points, and yet the raising of the rates by the Railroad Company had no effect whatever in re-establishing the water service. Speaking on the subject, Mr. Compton says:

> "The rates established, effective August 13, 1907, were considerably higher than the rates offered to the public by the steamship 'Manteo,' but the Manteo was unable to obtain any appreciable amount of freight thereon, and when this case was heard by the Commission in New Orleans in April, 1908, eight months after the advance in the rail rates, the Manteo had practically gone out of the Mobile business.
>
> "At the present time it makes but one sailing a week from New Orleans, and it my understanding and belief that it puts in at the port of Mobile only as an incident to its primary and principal business of handling freight to and from Panama City, in St. Andrews Bay, and would not handle any freight

from New Orleans to Mobile, but for the fact that it has to go to Mobile to take on its St. Andrews Bay business.

"As a further showing that there is no real or effective water competition from New Orleans to Mobile, I wish to point out that the total cargo capacity claimed by the Manteo is but 719 tons, and even if it were loaded to its capacity every trip with Mobile freight, leaving no space whatever for freight from New Orleans to Panama City, its home port, or for Carrabelle and Appalachicola, its ports east of Panama City, the total quantity it could thus handle would be an insignificant and infinitesimal proportion of the whole tonnage passing from New Orleans to Mobile." (Record, 211.)

The testimony of Mr. Powell as to the New Orleans-Mobile rates is fully corroborated by the testimony of Mr. Green, of the Southern Railway. Mr. Green says that not only were the rates, as fixed by the Railroad Company on August 13, 1907, and maintained until reduced by the Commission as of April 15, 1910, reasonably low, but he says:

"Indeed, I consider them unreasonably low. They were the result of water competition which has very largely disappeared, and, in my opinion, the Louisville and Nashville Railroad Company would have been justified in making them higher than they did make them on August 13, 1907." (Record, 166.)

Mr. Green then goes into detail in this matter and shows that these rates from New Orleans to Mobile, as maintained by the railroad company at the time they were reduced by the Commission, were lower than the rates of the Southern Railway in both Alabama and

Georgia, as fixed by the Railroad Commissions of those respective States for the distance of 141 miles (the distance from New Orleans to Mobile,) and lower than the minimum tariff prescribed by the Railroad Commission of Georgia for any carrier in that State for distances of 141 miles. He explains that this "minimum tariff" in Georgia is what the Georgia Commission calls its "standard tariff," but that it is authorized to permit, and does permit, some roads, including the Southern Railway, to charge higher rates than those of this standard scale, but he shows that the standard scale is itself higher on all the classes now under consideration than the Louisville & Nashville rates from New Orleans to Mobile. He also shows that these New Orleans-Mobile rates are lower than the Southern Railway's rates in Tennessee for this distance of 141 miles, lower than the Southern Railway's rates in South Carolina, and lower than rates between several different places specially mentioned by him. A table showing the result of this testimony by Mr. Green is as follows, which seems to us to be very striking:

Class	1	2	3	4	5	6	A
L. & N. rates from New Orleans to Mobile, 141 miles	50	39	38	31	27	16	20
Southern Railway rates fixed by Commissions of Alabama and Georgia for 141 miles	75	63	56	44	35	29	35
Minimum or Standard tariff of Georgia Railroad Commission 141 miles	60	50	45	35	28	23	28
Southern Railway rates in Tennessee, 141 miles	58	50	46	37	31	27	32
Southern Railway rates in South Carolina, 141 miles	62	52	42	39	31	24½	31
Southern Railway rates Chattanooga to Birmingham, 143 miles	57	49	41	32	27	19	27

Southern Railway rates Birmingham, Ala., to Columbus, Ga., 157 miles	57	49	45	35	28	22	27
Southern Railway rates Chattanooga to Atlanta, Ga., 138 miles	52	45	41	32	25	20	27

(Record, 166, 167.)

Mr. Bannon, of the New Orleans & Northeastern R. Co., says that the railroad rates from New Orleans to Mobile, as in effect immediately prior to the Commission's order reducing the same, "were reasonably low, and lower as a general rule than rates charged for similar distances under similar conditions." And that the rates established by the Commission, effective April 15, 1910, "are unfair and unreasonable for the reason that it has the effect of restoring the rates which were originally established many years ago from New Orleans in competition with boats operating from New Orleans to Mobile. These rates are unreasonably low, and were established by the railroad in order to meet water competition, over which it had no control." (Record, 291.)

Speaking of these rates Mr. Hattendorf, of the Illinois Central, says that but for the fact that the cities of New Orleans and Mobile have water connection, the railroad rates between them would be much higher than they are and would probably be on what is called the local scale of the Louisville and Nashville for the distance covered; that "the rates established were the result of water competition which at one time between those places was very considerable and resulted in a very low rate." (Record, 307.)

In this connection we should explain what is meant by a local distance scale of rates. Mr. Compton fully

explains this in his testimony (Record, 191), wherein he explains that this is a scale of rates based on distance; and which is believed to be fair, in and of itself, as a charge for the service performed; and which is charged where there are no special circumstances, such as competition with other roads, or with other markets, to require variation from this scale; and which might be spoken of as a basis scale. He says that this scale, as adopted by the Louisville & Nashville Railroad Company is fair; that under it producers have been able to market their goods with profit; that the country has grown up under it; and that it is lower than the distance rates of other railroad companies in the South. He says:

> "In the proceedings before the Alabama Commission and in the courts, involving such rates, it was demonstrated by the Louisville & Nashville Railroad Company, and never disputed, that the average of its distance rates was 3.3 per cent less than the average of the distance rates of the Georgia Commission, which are generally acknowledged to be on an exceedingly low plane." (Record, 191.)

A comparison between these local distance rates of the Louisville & Nashville Railroad Company for the distance of 163 miles with the New Orleans-Mobile rates (a distance of 163 miles) as they existed at the time the Commission undertook to reduce them is as follows:

Class	2	3	4	5	6	7
Louisville & Nashville local distance rate, 163 miles	35	40	44	39	33	26
New Orleans-Mobile rates in effect prior to Commission's action	39	33	31	27	16	20
Rates fixed by Commission	37	25	18	15	15	15

(Record, 202.)

The foregoing testimony to which we have thus far referred (with the exception of the reference to the local distance rates of the Louisville & Nashville Railroad Company) has been altogether testimony of railroad experts other than Louisville & Nashville Railroad men. But, in addition to the foregoing, we have the testimony of Mr. Compton, traffic manager of the Louisville & Nashville Railroad Company, on the subject of these New Orleans-Mobile rates, which is very full and very convincing. Of course, it is impossible to quote extensively from it. He gives the history of the establishment of the old rates, shows how they were established in active competition with water traffic; that as to Classes 3, 4, 5 and E they were actually less than the rates now charged on the same classes even by the water line, which to some extent professes to compete with this traffic. He shows that the rates as fixed by the company on August 13, 1907, which were in existence when the Commission reduced them, were as low or lower than the rates charged for similar distances between other competitive points in the South. And Mr. Compton also calls attention to the following considerations based on the character of the road from New Orleans to Mobile and to which we have not heretofore referred. He says:

> "The rates ordered by the Commission are unjust and unreasonable, because they do not take into account or make any allowance for the fact that the New Orleans-Mobile line of the Louisville & Nashville Railroad has never received an undue or unreasonable or even a fair return from its operations; or the fact that the road is exceedingly dif-

ficult and costly to operate and that a very considerable portion of it consists of long trestles and bridges which are subject to extraordinary damage and sometimes complete destruction by the floods and freshets constantly recurring in the streams which they span; and that its proximity to the Gulf of Mexico subjects the entire roadbed to the full force and extremity of the gulf storms and hurricanes, from which cause it was put entirely out of business for a continuous period of twenty-four days from September 20 to October 14, 1909, and for lengthy periods many times before; or the further fact that much of the territory traversed by the road is marshy, incapable of producing lucrative or remunerative local traffic; that New Orleans and Mobile are the only large cities located upon that line; that the intermediate country is so thinly settled and the successful and profitable operation and maintenance of that line is necessarily dependent upon the through traffic between New Orleans and Mobile proper and via those points to and from points beyond.

"They are also unjust and unreasonable, because they ignore and make no allowance for the fact that the cost of labor and materials necessary to the operation of the line have increased enormously since the said rates were originally established." (Record, 209.)

These considerations, we submit, show that the Commission was absolutely without any justification in declaring that the rates from New Orleans to Mobile, when it made its report in November, 1909, were unjust and unreasonable, and no justification for its reduction of those rates to the old figures which had been fixed to meet water competition, which at the time the Commission acted, and at the time the railroad company raised

its rates, had practically ceased to exist, which old rates, on the classes under which the bulk of the freight moved, as found by the Commission, were actually less, and materially less, than the rates on those same classes as charged even by the water line which was operating when this hearing was in progress.

NEW ORLEANS-PENSACOLA CASE.

Very little need be said as to the New Orleans-Pensacola case. With the exception that the Commission in its report occasionally links Pensacola with Mobile, the only statement made by the Commission as to this case is contained in the following paragraph:

> "The advance of the rates from New Orleans to Pensacola was as follows:
>
> "Three cents in the third class, 6 cents in the fourth, 7 cents in the fifth and 1 cent in the sixth class. This advance was not as heavy or as injurious to the merchants in New Orleans in their trade with Pensacola as the advance to Mobile, but they strongly protested against it, and it was shown that proportionate like conditions resulted from said advance as were produced by the increase in the rates to Mobile." (Record, 74.)

This statement is so general as to afford nothing that can be taken hold of to critize. Wherever the Commission in its report has specially mentioned any fact with reference to the New Orleans-Pensacola rate, in connection with the New Orleans-Mobile rate, we have already commented upon it in speaking of the New Orleans-Mobile case.

It is true, as the court will see from an examination of the evidence introduced before the Commission, that almost no attention was paid to the New Orleans-Pensacola rates. Most of the witnesses who testified said they were not in that trade and knew nothing about it; and the testimony as to these rates was absolutely inconsequential.

On the contrary, the testimony introduced in this case by the railroad company, the complainant, is of a character very similar to its testimony concerning the New Orleans-Mobile rates, and shows, as convincingly as men expert in the line in which they are testifying can show anything, that these rates which, as in the case of the New Orleans-Mobile rates were originally fixed in active competition with water rates, were too low, much lower than was justified when that water competition ceased; that the rates as fixed by the company in August, 1907, were just and reasonable as compared with other rates in the South and as viewed from any justifiable standpoint.

There was absolutely no testimony to justify the Commission in declaring the New Orleans-Pensacola rates, as it found them existing in 1909, to be unjust or unreasonable and therefore absolutely nothing to justify its interference with them.

INCREASE IN COST OF RAILROAD OPERATION.

In a preceding part of the brief we stated that we reserved certain general considerations for the close of the brief. We referred particularly to the increase in

cost of railroad operation in the last twenty years. The Commission in this case has put the rates from New Orleans to Mobile back to figures at which they were fixed twenty years ago. And as to the rates from New Orleans to Montgomery, the Commission has reduced them materially below the figures at which they have been maintained practically without change for the last fourteen years, and have fixed them much lower than they have been at any time within the last twenty years (except a period of a few weeks during a rate war in 1894). And the Commission has done this in face of the fact, as affirmatively shown in this record, without contradiction, that the cost of railroad operation has greatly increased above what it was, either in 1896, when the rates from New Orleans to Montgomery were fixed, or in 1888, when the rates from New Orleans to Mobile were fixed, to which the Commission has ordered the company to return. In an affidavit of Mr. W. L. Mapother, first vice president of the Louisville & Nashville Railroad Company, which affidavit is by consent read in this case as a deposition, he filed a tabulated statement showing the expenditures of the Louisville & Nashville Railroad Company, for salaries and wages during the years ending June 30, 1888, 1896, 1908 and 1909, and in this connection shows what the expenditures for labor in 1909 would have been if the same scale of wages had been paid which were in effect in 1888 and 1896. This affidavit and table show that whereas the average daily compensation of all men employed by the Louisville & Nashville Railroad Company for the year ending June

30, 1909, was $2.08, this compensation for the year ending 30, 1896, it was $1.62; and that by reason of this increase in compensation to employes the Louisville & Nashville Railroad Company for the year ending June 30, 1909, was compelled to pay $3,746,979.34 more to its employes than it would have been required to pay under the scale of compensation which existed in 1888; and was compelled to pay $3,443,135.18 more than it would have been compelled to pay at the rate of compensation which existed in 1896. Yet the Commission, notwithstanding this very great increase in salaries and wages, has required the company to go back to the freight rates charged in 1888 for transportation from New Orleans to Mobile and has actually required it to materially reduce the rates charged from New Orleans to Montgomery.

The affidavit of Mr. W. A. Colston, assistant comptroller of the Louisville & Nashville Railroad Company, was also read by consent as his deposition, and he shows, among other things, that whereas the operating expenses of the Louisville & Nashville Railroad Company for the year 1888 were only 63.89 per cent of the operating revenues for the same year, yet in 1907, when the increase in rates was made from New Orleans to Mobile the operating expenses were 74.14 per cent of the operating revenues, and in 1908 were 79.51 per cent of the operating revenues. (There was a change in the method of accounting in 1908 which made the proportion apprently less, as Mr. Colston explains, but the figures above are given on the same method of accounting

throughout.) And while the proportion of operating expenses to operating revenues for the year 1909 drop down to 69.37 per cent, yet both Mr. Colston and Mr. Mapother explain that the reason for this was that the year beginning June 30, 1908, and ending June 30, 1909, was a year following a financial panic and was one of extraordinary retrenchment in the matter of expenses. Mr. Mapother says:

> "No work was done during that year which could be omitted consistent with the safe operation of the road, and thus labor was reduced to a minimum, consistent with such safe operation."

But he says:

> "While such work was thus omitted during that particular year, this was only a temporary omission, which has had the effect of largely adding to the work done in the year ending June 30, 1910." (The exact statistics of which latter year could not be obtained at the time this affidavit was given.)

Mr. Green of the Southern Railway also files with his deposition certain exhibits taken from the statistics of railways prepared by the Interstate Commerce Commission for the year 1907, and certain other statistics prepared by the Bureau of Labor in the Department of Commerce and Labor, issued in July, 1908, from which it appears that the record of the Interstate Commerce Commission show the general increase in compensation of railways employes for the decade beginning 1897 and ending 1907, for that portion of the country including the section we are now considering, which is referred to as Group 5. This table shows, among other things, the

following increases in daily compensation: general officers, $1.92; other officers, $1.60; enginemen, $.90; firemen, $.45; conductors, $.71; other trainmen, $.53; machinist, $.71; carpenters, $.40; other shopmen, $.26; section foreman, $.21; other track men, $.27, etc. (Transcript, 139-a). And the table issued by the Bureau of Labor in the Department of Commerce and Labor shows that from 1890 1907 wages per hour of employes in the United States, have increased in the proportion represented by 100.3 to 128.8, and that the food purchasing power of these hourly wages in the same period has increased as represented by the figures 97.9 to 106.8. (Transcript, 139-b.) Of course, this last mentioned table has no very direct bearing upon the cost of railway operation, except as railway operation and the payment of railway wages are part of the general wage paying of the country.

Mr. Hattendorf of the Illinois Central Railway, also introduces a statement prepared by the operating department of that company, which contains some exceedingly pertinent information bearing on the question under consideration. After speaking of the increase in the compensation of employes in the last ten years, and after showing also that for cross-ties the Illinois Central paid in 1910 (meaning doubtless the year ending June 30, 1910), $370,822.00 more than it would have paid for the same ties at the rate prevailing in 1900; that it paid for rails, $22,440.21 more than it would have paid at the 1900 rate, and that it paid for coal $800,568.53 more than it would have paid at the 1900 rate, then says:

"Another reason why cost of operating railroads is more expensive than it was ten years ago is due to the compliance with Federal and State laws respecting safety appliances, hours of service, etc. These are items we did not have ten years ago at all." (Then follows a table showing what had actually been paid out for these items.)

And again he says:

"Then, too, comes the question of the cost of locomotives, freight cars, etc., and while it is claimed by some people that the increased size of locomotives and cars have more than offset the increased cost of labor and material, it will be seen from the following such statements are not true:

	1910	1900	Per cent Increase
Cost of locomotives owned (freight)	$17,346.00	$12,146.00	43.00
Potentiality of locomotives owned (freight)	1,217.00	1,070.00	14.00
Cost of freight cars	1,012.00	722.00	40.16
Capacity of freight cars	50-ton	40-ton	25.00

"You will note from the above, while the cost of locomotives has increased 43 per cent, the potentiality or capacity of the engine, that is, the average gross ton mile per train mile has only increased 14 per cent; and while the cost of freight cars has increased 40.16 per cent, the capacity of freight cars has only increased 25 per cent. With the larger locomotives and cars and faster service required by the public, comes increased expense in the way of maintaining both equipment and track. The Safety Appliance Act has also contributed largely to increased maintenance. As a result of this act, it has been necessary to construct gravity yards for the handling of cars, and as the train and yard men do not go in between the cars to couple and uncouple them at the present time, the switching and making

up of trains is done in a much rougher manner than it used to be, which has been the result of very heavy damage to equipment. The agitation of public sentiment and of adverse laws, making it necessary for railroads to spend large sums of money elevating tracks, eliminating grade crossings, installing interlocking devices, block signals, etc., is another feature that has contributed largely to increased cost of operation to the railroad." (Rec. 301.)

As to the unusual cost of the operation of the particular line of railroad from New Orleans to Mobile and the extraordinary poverty of the country between those two cities as a source of traffic, we have already referred to the testimony of Mr. Compton, traffic manager of the Louisville & Nashville Railroad Company. But in addition the deposition of W. H. Courtenay, chief engineer of the Louisville & Nashville Railroad Company was taken, who elaborately corroborates the statements made by Mr. Compton. Among other striking features in Mr. Courtenay's deposition bearing upon the cost of operation and repair of this road, is the statement that as the result of a storm on October 2, 1893, traffic was suspended on this road for 15 days, and that the cost of repairing the railroad was $125,335.00; that again as the result of a storm on April 23, 1900, traffic was suspended 5 days, the cost of repair to the railroad being $7,151.00; that again as the result of a storm on September 26, 1906, traffic was suspended 8½ days, the cost of repair being $107,698.00; that again, as the result of a storm on September 20, 1909, traffic was suspended 23 days, the cost of repair being

$300,000.00. (Record, 324.) Mr. Courtenay says further that the towns on the line of this railroad between New Orleans and Mobile are mainly summer resorts, frequented by people from New Orleans and elsewhere; that there is only a small labor population in the territory adjoining the railroad, which makes it difficult to obtain a sufficient number of men for the maintenance of the road and makes it necessary to pay higher prices than are paid elsewhere, and makes it furthermore necessary to send them to their homes at frequent intervals; because in the marshes along the line of the road it is difficult to prevail upon the men to work in them; that there is practically no manufacturing done between the terminal points of this road and "very little business for the railroad other than passenger traffic and shipment of oysters and fish which originate at intermediate points on this division." (Record, 324.) 490.)

CONCLUSION.

For the foregoing reasons we respectfully submit that the rates fixed by the railroad company for the transportation of the classes of freight in question, and which the Commission found in force, were not unjust or unreasonable, either for the transportation from New Orleans to Montgomery, for the transportation from New Orleans to Mobile, or the transportation from New Orleans to Pensacola, and that there was *no substantial evidence* to that effect; and that there was therefore no

justification for the Commission's reducing the rates in any of those cases, nor any authority under the Interstate Commerce Act for it so to do; and, therefore, the decree of the Commerce Court enjoining the Commission from putting into effect, or from further enforcing any of the reduced rates which it ordered effective April 15, 1910, should be affirmed.

October 1, 1912.

Respectfully submitted,

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